




COMPARATIVE FEDERALISM

A Systematic Inquiry

SECOND EDITION

THOMAS O. HUEGLIN AND ALAN FENNA



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—Thomas O. Hueglin

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—Alan Fenna

Preface

MUCH HAS HAPPENED IN THE WORLD of federalism since the first edition of this book appeared. We are grateful to our publisher for this opportunity to update, enhance, and correct. The result is a better book, faithful to its original structure and systematic intent, yet more up to date, more inclusive of the federal experience in its principal varieties, and more balanced in its comparative judgements. Here are the main changes:

1) Retaining our original distinction of basic models and variations, we have considerably expanded on the latter. Thus, while it is still possible and useful to see the presidential federal systems of Latin America as institutional variations of the classical American model, for instance, the dynamic evolution of Latin American federalism deserves more scrutiny in its own right. Likewise, while Canada can still serve as the first model of a parliamentary federation, others such as Australia and India in particular are so distinct in institutional as well as procedural terms that it is misleading just to record them as mere variations. And new federal systems such as South Africa, Belgium, and Spain require a more critical look at functionality and stability.

2) While we did incorporate some of the classical debates and conceptualizations about federalism, our analysis fell short of discussing the dynamics of stability and change. Particularly in this regard, a new wealth of federalism literature has appeared in the meantime. In this edition, we pay more attention both to classical arguments and to the newer literature, with space limitations being the main constraint on giving those works the recognition they deserve. Work on this second edition was overshadowed by the loss of Richard Simeon, a friend and mentor to both of us, and a scholar who combined respect for classical debates and curiosity for new approaches like no other.

3) It is quite obvious where we most clearly had to update our analysis of the basic models. While American federalism remains the classical model, it ever more appears to us as a case of exceptionalism, posing limits to the extent that other federations might imitate or learn from it. Canadian federalism, meanwhile, has taken a turn back to intergovernmental disengagement—so much so that it fell to the Supreme Court of Canada to remind intergovernmental combatants of what it sees as a collaborative constitutional convention complementing the constitutional intent of keeping powers divided. Germany went through a major round of constitutional reforms, which, however, in the assessment of most, did not fundamentally alter its basic contours as the prime model of integrated and administrative federalism. Finally, there is the European Union: its constitutional treaty failed, and it appears

mired in an ongoing crisis of fiscal governance. Nevertheless, we retain it as one of our basic models because its commitment to negotiate flexible and innovative solutions appears undiminished.

4) We substituted a new chapter on fiscal federalism for the chapter on federal governance. It seemed to us that a book with a primary emphasis on institutional design and procedural practice could not do justice to policy-making without adding what would almost have to amount to a second book. Fiscal federalism, on the other hand, needed to be included as it is perhaps the central and most problematic cornerstone of federalism in practice.

5) Last but by no means least, the first edition perhaps painted too rosy a picture of federalism as the most relevant solution to governance in a changing world. We have therefore framed the systematic narrative with two new chapters, an opening chapter on the promise of federalism, and a brief concluding observation on its limits.

Comparative federalism as we understand it is more than just an inventory of institutional structures and procedural practices. Federalism is almost always the result of careful deliberation, agreement on choice and compromise among constituent members. It differs from other forms of plural or multilevel governance in that it contains a strong commitment to balanced equality. This requires including within the comparative analysis of federal systems a normative discernment of purpose that defies easy classification. The models and variations of *Comparative Federalism*, therefore, are less exact templates than they are prototypes of possibility.

The Promise of Federalism

IN THE NINETEENTH CENTURY, THE FRENCH theorist of socialist federalism Pierre-Joseph Proudhon wrote that “the twentieth century will open the age of federations, or else humanity will undergo another purgatory of a thousand years.”¹ After the purgatory of two world wars (and countless other wars) in the twentieth century, the eminent American scholar of federalism Daniel Elazar wrote of an ongoing “federalist revolution” as the only safeguard for peace and stability in a rapidly changing world.² At the beginning of the twenty-first century, peace has remained as elusive as ever in many parts of the world, but federalism at least seems to have become “everybody’s second choice” of institutionalized conflict management in cases of deeply divided societies such as Sri Lanka or Iraq.³ Whether federalism can actually deliver on the promise of conflict stabilization and peace or does the opposite, by providing institutionalized opportunity structures for the perpetuation of division and conflict, remains an open question.⁴ While we focus on the promise of federalism in this introductory chapter, we will return to some of the obvious challenges and limitations in the concluding chapter.

The Case for Federalism

Governing more than half of the world’s land area and nearly half of its population, federalism is obviously here to stay. As we will see, this world of federalism includes some of the largest countries, such as the United States, Canada, India, and Brazil, as well as some of the smallest, such as Switzerland and the Federated States of Micronesia. What we think of as the promise of federalism, however, is how its inherent principle of **divided and shared rule** can meet the challenge of diversity. Such challenges have accompanied the entire history of modern nation-state

1 Pierre-Joseph Proudhon, *The Principle of Federation* (Toronto: University of Toronto Press, 1973), 68–69; originally published in 1863 as *Du Principe fédératif et de la nécessité de reconstituer le parti de la révolution*. For discussion of Proudhon’s interest in federalism, see Chapter 4 below.

2 Daniel J. Elazar, *Federalism and the Road to Peace* (Kingston, ON: Institute of Intergovernmental Relations, Queen’s University, 1994), esp. 21–25.

3 David Cameron, “The Paradox of Federalism: Some Practical Reflections,” *Regional and Federal Studies* 19.2 (2009): 315–16.

4 Zachary Elkins and John Sides, “Can Institutions Build Unity in Multiethnic States?” *American Political Science Review* 101.4 (2007): 693–708.

formation, and they have become particularly salient at the present time when it seems that claims of nation-state sovereignty can no longer contain aspirations of cultural, religious, or even merely territorial self-determination and autonomy. This is evident in a wide range of settings, including established unitary democracies such as the United Kingdom and Italy. Devolution marked an historic development in the UK, allowing an important degree of self-government for Scotland, Wales, and Northern Ireland.⁵ Although the Scottish independence referendum of 2014 returned a decisive “no” vote, the process generated greater pressure for further steps. And Italy—which, as we shall discuss in Chapter 5, took the unitary fork in the road at unification when it might have taken the federal—has implemented a number of federalizing reforms.⁶

The Challenge of Diversity

In one way, and without much exaggeration, we might say that federalism is as old as human civilization. People have always organized social life in small communities, groups, clans, neighbourhoods, towns, and regions, and have always engaged with other such communities for the purpose of mutual benefit. They did so even when they lived in large kingdoms or empires because, until the modern age of communication and transportation, these did not have effective means of central control. We might therefore argue that this form of “federal” organization has been the predominant form except for a relatively brief period in human history, the last 350 or so years associated with the rise of the modern territorial nation-state.”

We might finally argue that it is the crisis of modern statehood in at least some parts of the contemporary world that is bringing the idea and promise of federalism to the fore again. When Germany emerged from years of unitary totalitarianism at the end of the World War II, for example, an argument for a much more radical return to the federal form than the West German Basic Law

5 Russell Deacon, *Devolution in the United Kingdom*, 2nd ed. (Edinburgh: Edinburgh University Press, 2012); Charlie Jeffery, “Devolution in the United Kingdom,” in John Loughlin, John Kincaid, and Wilfried Swenden (eds.), *Routledge Handbook of Regionalism and Federalism* (Abingdon: Routledge, 2013), 317–30.

6 Beniamino Caravita di Toritto, “The Road to Federalist Government System in Italy,” in Ralf Thomas Baus, Raoul Blindenbacher, and Ulrich Karpen (eds.), *Competition versus Cooperation: German Federalism in Need of Reform—A Comparative Perspective* (Baden-Baden: Nomos, 2007); Francesco Palermo, “Italy: a federal country without federalism?,” in Michael Burgess and G. Alan Tarr (eds.), *Constitutional Dynamics in Federal Systems: Sub-National Perspectives* (Montreal: McGill-Queen’s University Press, 2012), 237–54.

7 See Thomas O. Hueglin, “Federalism: An Alternative Category in Political Thought?,” in Rekha Saxena (ed.), *Varieties of Federal Governance: Major Contemporary Models* (New Delhi: Oxford University Press, 2011), 3–17.

would provide was that “all social life is federalist in character.”⁸ And much more recently, even the slum dwellers in Mumbai, neglected as they are under the form of federal statehood that exists in India, have begun a process of self-organization in which the term *federation* has taken on “special meaning and magic.”⁹

But what exactly is this magic, and what promise does it hold? It is now quite common to distinguish two different purposes for the formation of modern federal systems.¹⁰ One, and the historically older one, has been called “coming-together” federalism: previously independent or at least largely autonomous polities decide to form a federal union. The most obvious example is that of the United States. The promise is that mutual benefits will result from economic union and common security. The other and historically more recent reason has been called “holding-together” federalism: subnational entities in an already existing polity are granted a guaranteed measure of autonomy. A recent example is the federalization of Spain after the end of the unitary Franco regime in 1975. The promise is to maintain the mutual benefits of union while providing long-sought autonomy.

It is this promise of autonomy that has brought federalism to the forefront of conflict-management efforts around the world. It is, in other words, the promise of striking a balance between unity and diversity through the combination of divided and shared rule. The most profound expression of this balance can be found in the principle of **subsidiarity**, according to which powers should be allocated at the lowest practicable level of governance in a multi-tiered polity. This principle was first developed at the dawn of the modern age when religious minorities fought for survival under the emerging system of territorial state sovereignty and state religion (see Chapter 4), and it has most recently found explicit expression in the regulation of European Union governance (see Chapter 6). Implicitly, however, it has guided the division of powers in the formation of all federal systems.

The Promise of the Federal Form

The modern age of states and societies brought with it a dominant political focus on persons and their individual interests. This focus overshadowed—or outright suppressed—the extent to which places and their collective interests remained a source of belonging and identity. Even in the established federal states, the concern for individual welfare tilted the balance of unity and diversity

8 Franz W. Jerusalem, *Die Staatsidee des Föderalismus* (Tübingen: Mohr, 1949), 6.

9 Arjun Appadurai, “Deep Democracy: Urban Governmentality and the Horizon of Politics,” *Public Culture* 14.1 (2002): 32.

10 Alfred Stepan, “Federalism and Democracy: Beyond the U.S. Model,” *Journal of Democracy* 10.4 (1999): 22–23.

into the direction of creeping centralization. But the trend is not all one way. Québec's Quiet Revolution during the 1960s forced Canada to recalibrate its federal balance in order to ward-off the spectre of secession, and even Germany's brand of "unitary federalism" has undergone a modest measure of decentralization more recently. Secessionist threats in federal Spain (notably from Catalonia) and the unitary—even though already "devolved"—United Kingdom will have to be countered by offers of tilting the balance even more in the direction of diversity rather than unity. We already mentioned federal holding-together efforts in war-torn countries of Asia and the Middle East, and we will have to return to these when we discuss the limits of federalism in our concluding chapter.

However, at the beginning of our systematic comparative exploration, we want to suggest that federalism is an obvious and promising institutional response to the challenges of unity and diversity. It has a long history and tradition in political thought and practice. In search of new and more adequate forms of governance for a changing world, therefore, the wheel does not have to be invented all over again. Because it is by definition a form of divided and shared rule, federalism allows flexible solutions to complex situations of overlapping jurisdiction and contested sovereignty. The concept of federalism includes constitutionally guaranteed member equality and at least a modicum of redistributive social solidarity. This is what distinguishes federalism most clearly from other forms of multilevel governance. These two reasons alone should give some credence to the plausibility that federal promise can be turned into federal success.

Federal Success

What we mean by federal success is not a miracle formula for the ideal allocation of resources and responsibilities in complex or divided societies. Ideal solutions rarely if ever exist in real life. Federalism is a political form giving organized territorial expression to the need for compromise among competing claims and aspirations. We therefore simply define federal success as the absence of existential conflict such as war or secessionist withdrawal. As was hammered home to the Scottish people during the 2014 referendum campaign, withdrawal by no means automatically opens the door to ideal solutions either. Federal success includes the periodic efforts of many federal systems to recalibrate the balance of unity and diversity through federal reform, even when such reforms are typically met with only limited success. This is simply the normalcy of federalism as a system of negotiated political accommodation.

With that normalcy in mind, we can take stock of a number of recent success stories. Federal principles, we argue, have played a prominent role in uniting Europe, a continent torn by war for centuries, into a peaceful union; established federations such as Canada and Germany have proven resilient beyond expectation in the wake of dramatic change; federalism has helped transform the dictatorships of

Spain, Brazil, and South Africa into democracies; and federalism has been a helpful tool of conflict management in multicultural countries such as India, Belgium, and Northern Ireland.

Federalism and European Integration

The European Union (EU) is perhaps the leading example of federal success. Yes, the EU has been experiencing fiscal and governance challenges (see Chapter 7); however, the larger picture unmistakably points to a remarkable success story.

The process of European integration arose out of the ashes of the Second World War. It was driven by both a pervasive desire for peace and a realization that economic integration was necessary in order to defend European interests against the world's two superpowers of the time, the United States of America and the Soviet Union. It brought an end to centuries of European warfare, and in particular to the deep animosity that had existed between Germany and France ever since German rather than French kings were elected Holy Roman Emperors during the Middle Ages. The removal of border controls between these two countries (as well as between most other EU member states) under the 1985 Schengen Agreement more than anything else illustrates how mistrust has given way to cooperation.

With 28 member states as of 2013, the EU has surpassed both the US and China as the world leader in global imports and exports.¹¹ Its institutional framework has evolved gradually but steadily from **intergovernmentalism** to **supranationalism**. Some policy areas remain in the domain of member-state sovereignty, while others have reached the level of full political integration. This resembles the division of powers in federal states. Legislation now almost invariably requires co-decision by two bodies: the Council of Ministers and the European Parliament. This resembles bicameral or dual representation in federal states. As is the case in most of the established federal states as well, the EU practises a system of revenue sharing and redistribution; its regulations have direct effect on member states, citizens, and corporations; a high court, the European Court of Justice, not only adjudicates compliance with EU laws and regulations but, moreover, has acquired powers of judicial review. For all these reasons, we have included the EU as one of our four basic models of federalism.

It is a novel type of federal system, though.¹² It differs from conventional federalism in that the ultimate source of authority for the allocation of powers and the determination of their scope and dimension is not a constitutional document but a series of treaties based on mutual agreement. In fact, this

¹¹ http://europa.eu/about-eu/facts-figures/economy/index_en.htm

¹² See Finn Laursen (ed.), *The EU and Federalism: Politics and Policies Compared* (Farnham, UK: Ashgate, 2011).

strengthens our argument of the EU as a case of federal success. As a novel case of **treaty federalism**, the EU highlights a procedural dimension of inter-governmental policy-making inherent in all federal systems and particularly prominent in comparable cases such as Canada.¹³ With its more flexible provisions for dividing and sharing powers according to time and circumstance, it may also serve as a new model of governance in a globalizing world. Similar efforts of regional economic integration, although still entirely at the level of confederal intergovernmentalism, already exist in South America (Union of South American Nations, USANO) and Asia (Association of Southeast Asian Nations, ASEAN).

The Resilience of Established Federations

When we think about federalism, we do not primarily have in mind the difficult process of separate states coming together in a union—although that has of course been the founding story of the classic federations. More likely, we think of established federal states where the federal form of government is rarely if ever disputed. Here we can find important instances where the federal form plays a significant role in guiding established federations through turbulent times of dramatic change. Such has been the case in Canada and Germany.

Canada and Québec Separatism

The integrity of the federal form as first adopted in Canada with the *British North America Act* of 1867 has been threatened by Québec separatism since the Quiet Revolution of the 1960s. Referendums on dissociation from the rest of Canada were held in 1980 and 1995. While both ended with a victory by the federalist camp, the outcome in the second referendum was precariously close. Since then, the threat of separatism appears to have subsided, but it would be premature to assume that it has gone away for good.

It would be easy to characterize Québec's troubled relationship with the rest of the country as a failure of Canadian federalism. In our view, however, Canadian federalism is a remarkable success story against considerable odds, the asymmetrical juxtaposition of nine predominantly anglophone provinces and one primarily francophone province in a bicommunal federation. The institutions and procedures of Canadian federalism, we argue, have played a significant part in holding that federation together. Innovative constitutional solutions came about through multilateral negotiations with provincial players who shared a number of concerns with the Québec government. These included an amending formula differentiating between unanimity and qualified majority requirements with opting-out provisions, and a notwithstanding clause allowing the

13 See Thomas O. Hueglin, "Treaty Federalism as a Model of Policy Making: Comparing Canada and the European Union," *Canadian Public Administration* 56.2 (2013): 185–202.

protection of collective cultural rights by a temporary override of individual rights under the Canadian *Charter of Rights and Freedoms*. French-Canadian interests were never entirely off the table as they might have been in a unitary Canadian state.¹⁴

Germany and Reunification

If separatism has been the main threat to Canadian federalism, a serious challenge to the federal form in Germany came from the opposite direction: the reunification of West Germany with its East German counterpart in 1990. As reconstructed after the end of the Second World War, West Germany quickly came to be seen as a poster child of federal stability. There were no significant cultural differences; the direct participation of the *Länder* (state) governments in federal legislation via the second chamber, the *Bundesrat*, was widely regarded as a regime of constructive cooperation; and there was enough overall wealth to allow for a generous scheme of fiscal equalization whereby revenue flowed from the richer to the poorer *Länder* in order to achieve the “equitability of living conditions” for all citizens as prescribed under the Basic Law.

When five much poorer new East German *Länder* were added to the system, many feared that the regime of stable cooperation would not survive. Yet while conflict did arise—or rather intensified tensions that had already existed—reunification became a success story in which the federal system itself played a central and constructive role.¹⁵ There were three main challenges. After 40 years of unitary communist rule, would the new East German *Länder* have the political and administrative capacity to play their role in the federal system? Would Germany’s integrated system of federalism, which requires *Länder* approval via the *Bundesrat* for most legislative decisions at the federal level, break under the strain of six additional players?¹⁶ And, most importantly, would the addition of five poor *Länder* exhaust Germany’s capacity for fiscal equalization—or at least the willingness of the rich *Länder*, now reduced to a minority of three, to pay for it?

The response to the first challenge was perhaps the most innovative: *Länder* in east and west were twinned, and eastern *Länder* could temporarily “borrow” civil servants from their western cousins. A constitutional reform in 2006 addressed

14 See David Cameron, “Quebec and the Canadian Federation,” in Herman Bakvis and Grace Skogstad (eds.), *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, 3rd ed. (Don Mills, ON: Oxford University Press, 2012), 38–58.

15 See Gerhard Lehmbruch, *Parteienwettbewerb im Bundesstaat: Regelsysteme und Spannungslagen im Politischen System der Bundesrepublik Deutschland* (1976; Wiesbaden: Westdeutscher Verlag, 2000), 127–33.

16 In addition to the five new East German *Länder*, Berlin also gained full constitutional *Land* status after reunification.

the second challenge by disentangling at least some of the areas of jurisdiction requiring bicameral approval. A satisfactory resolution of the third challenge, fiscal equalization, is still pending and has to be addressed by 2019 when the current arrangement expires.

Yet there can be no doubt that federalism did play a constructive role in one of the most dramatically transformative episodes of German history. In the absence of significant cultural differences, the justification of the federal form in Germany primarily lies in its provision of a vertical division of powers.¹⁷ This federal form not only assisted in the democratization of Germany after the Second World War, but also proved instrumental in the arduous task of reunification. While federalism is obviously little needed for managing cultural diversity in such a regionally homogeneous country as Germany, it is nevertheless part of the country's political culture.

Federalism and Democratization

Ever since the French Revolution, which swept away the particularistic structures of feudal privilege, social progress has been associated with democratic centralism based on universal rights. Central power structures, however, can be abused. In a number of countries, therefore, the experience with centralized dictatorship led to a process of rethinking. Democratization became synonymous with federalism. In some cases, such as Pakistan and Ethiopia, federalism has been closely linked to democratization.¹⁸ In others, such as Indonesia, federalism is seen as a threat to the integrity of the state and is resisted, although democratization has been accompanied by some devolution.¹⁹ We point to federal success in three particularly instructive cases with vastly different experiences: Spain, South Africa, and Brazil.

Democracy and Federalization in Spain

General Franco's death in 1975 ended nearly 40 years of centralized dictatorship and oppression of Spain's considerable cultural diversity and regional identities. Three years later, a new democratic constitution was in place. In its famously

17 See Arthur Benz, *Der Moderne Staat* (Oldenbourg: Wissenschaftsverlag, 2008), 151.

18 Katharine Adeney, "A Step Towards Inclusive Federalism in Pakistan? The Politics of the 18th Amendment," *Publius* 42.4 (2012): 539–65; Assefa Fiseha and Mohammed Habib, "Ethiopia," in Luis Moreno and César Colino (eds.), *Diversity and Unity in Federal Countries* (Montreal: McGill-Queen's University Press, 2010), 139–66.

19 See Gabriele Farrazzi, "Using the 'F' Word: Federalism in Indonesia's Decentralization Discourse," *Publius* 30.2 (2000): 63–85; Anthony Reid, "Indonesia's Post-Revolutionary Aversion to Federalism," in Baogang He, Brian Galligan, and Takashi Inoguchi (eds.), *Federalism in Asia* (Cheltenham, UK: Edward Elgar, 2007), 144–64.

ambiguous Section 2, this constitution determined that the “indissoluble unity of the Spanish Nation” would be based on the “right to self-government of the nationalities and regions of which it is composed.” The outcome was *El Estado de las Autonomías*, a national union comprising 17 autonomous communities.²⁰

Because the powers of these autonomous communities are based on statutes individually negotiated with the central government rather than constitutionally enshrined, Spain is not a federation in the classical sense and does not describe itself officially as “federal.” However, a number of constitutional safeguards suggest that it is a federation in all but name: the national parliament cannot legislate in violation of the communities’ statutory powers, which are protected by Constitutional Court review (therefore enjoying *de facto* constitutional status); and the central government cannot unilaterally change the constitution. Moreover, these safeguards are complemented by a political culture that now overwhelmingly identifies democracy with diversity and regional autonomy.²¹

Federalism in Post-Apartheid South Africa

The journey from apartheid dictatorship to democratic federalism in South Africa took longer, and it would be a stretch to call South African federalism a success as yet. Seven years after Nelson Mandela’s famous walk out of prison in 1990, a new democratic constitution created nine provinces as well as a constitutionally recognized and protected tier of local government.²² As in the Spanish case, it created a federal system in all but name, providing for most of the institutional features typically associated with federalism—and unlike most other federal systems even including constitutionally enshrined principles of intergovernmental cooperation. However, the federal system as prescribed by the constitution is as yet far from reality. A particular impediment to federal success is the dominance of the African National Congress (ANC), which governs at the centre as well as in all nine provinces without a credible

20 See Jordi Solé Tura, *Nacionalidades y Nacionalismos en España: Autonomías, Federalismo, Autodeterminación* (Madrid: Alianza Editorial, 1985), 89–136. It is significant to note that Solé Tura was one of the seven “fathers” of the Spanish constitution on behalf of the formerly fiercely centralist Spanish Communist Party (PCE).

21 See Gemma Sala, “Federalism without Adjectives in Spain,” *Publius* 44.1 (2014): 109–34; Luis Moreno and César Colino, “Kingdom of Spain,” in Luis Moreno and César Colino (eds.), *Diversity and Unity in Federal Countries* (Montreal: McGill-Queen’s University Press, 2010), 288–319.

22 See Nico Steytler, “Republic of South Africa,” in John Kincaid and Alan Tarr (eds.), *Constitutional Origins, Structure, and Change in Federal Countries* (Montreal: McGill-Queen’s University Press, 2005), 311–46.

alternative anywhere in sight. Real federalism in a one-party state is not a likely scenario. Moreover, the provinces and localities have few significant powers or fiscal resources of their own, and their governments have yet to develop into fully functional counterparts to the federal centre.

Federalism has nevertheless played, and continues to play, a crucial role in the South African path to democracy. The decision in favour of constitutionally enshrined decentralization was fundamental to reach consensus on democratization in a deeply divided country where the majority had long been excluded. Poor performance of the system is due more to the general lack of "skilled policy makers, administrators, and professionals" at all levels of government than to federalism *per se*. Yet, as the constitution "opens the door to local and provincial autonomy and initiative and creates new political elites and new arenas for participation," promise may still turn into success.²³

The Democratization of Federalism in Brazil

Post-colonial Brazil became a formally constituted federal state in 1891. Yet not until five constitutions later, in 1988, did federalism combine with a meaningful and lasting measure of democracy. As in many other post-colonial states, Brazilian history oscillated between periods of republican liberalization and repressive authoritarianism.

Periods of liberalization were accompanied by democratically inspired efforts at strengthening state and local autonomies, which ironically played into the hands of regional oligarchs who dominated decision-making in the bicameral Congress. During periods of nationalist authoritarianism, military leaders found support from industrial elites in the urban centres, yet they also used the institutions and structures of federalism to consolidate their power while also retaining a semblance of legitimacy.²⁴ Instead of shutting down the elected Congress, they used it as a means of control. By creating two new rural states with small populations and fusing two developed ones, they increased the already disproportional number of deputies and senators from underdeveloped areas dependent on central handouts, thus availing themselves of loyal majorities in both chambers. When democracy returned, it was these majorities in the constituent assembly that crafted the 1988 constitution, who not only pressed successfully for the creation of three more rural states, but also further enhanced the powers of the Senate in which they dominated. As a result, democratic federalism in Brazil

23 Christina Murray, "Republic of South Africa," in Katy Le Roy and Cheryl Saunders (eds.), *Legislative, Executive, and Judicial Governance in Federal Countries* (Montreal: McGill-Queen's University Press, 2006), 261.

24 See Alfred Stepan, "Brazil's Decentralized Federalism: Bringing Government Closer to the Citizens?" *Daedalus* 129.2 (2000): 145–69.

continues to be haunted by the unresolved tension between local privilege and central reform.

It would be easy to dismiss the Brazilian case as a rather unimpressive success story. Yet it seems clear that the eventual democratization of a diverse country the size of a continent could be achieved only by means of federal institutions and structures aiming at balancing diversity and unity. As in the South African case, but with far more significant consequences to date, the 1988 constitution established a three-tiered federal system in which the municipalities enjoy considerable policy-making authority. This has not only helped in diffusing some of the vestiges of regional power and corruption; it has also allowed federal governments to implement trans-territorial and functional schemes for inter-governmental cooperation in such policy areas as fiscal management, health, education, and regional development. Complementing the institutional design of Brazilian federalism as in other federations, this evolution of cooperative federalism points to a promising future that may eventually strike the right balance between diversity and unity.²⁵

Federalism and Conflict Management

As we mentioned at the outset, federalization has become a widely suggested formula for conflict management in deeply divided societies such as in Sri Lanka and Iraq.²⁶ In neither of those instances, however, can one hold out much hope for federal success. The problem is that the conventional territorial form of federalism often squares poorly with dispersed patterns of diversity, and, moreover, ethno-cultural intransigence stands in the way of principled and peaceful cooperation. The promise of federalism nevertheless lies in the flexibility it offers for organizing such cooperation. Again, we focus our introductory discussion on three vastly different cases of considerable promise, if not success: India, Belgium, and Northern Ireland.

Territorial Conflict Management in India

The Indian federation was forged from 14 British colonial provinces as well as hundreds of semi-sovereign princely states comprising hundreds of languages as well as a multitude of virtually all of the world's major religions.²⁷ The daunting

25 See Marcus Faro de Castro and Gilberto Marcos Antonio Rodrigues, "Brazil," in Luis Moreno and César Colino (eds.), *Diversity and Unity in Federal Countries* (Montreal: McGill-Queen's University Press, 2010), 75–108.

26 Brendan O'Leary, "The Federalization of Iraq and the Break-up of Sudan," *Government and Opposition* 47.4 (2012): 481–516.

27 Akhtar Majeed, "Republic of India," in John Kincaid and G. Alan Tarr (eds.), *Constitutional Origins, Structure, and Change in Federal Countries* (Montreal: McGill-Queen's University Press, 2005), 180–207.

prospect of holding together such diversity compelled the constitutional framers to opt for what they expected to become a centralized as well as secularized federal republic in 1950. If federalism ever was to be a “tragic compromise,” this could have been the one.²⁸ Yet despite recurring crises of religious rioting, assassinations, caste-related massacres, and even military conflict, as in the 1984 army raid on the Sikh Golden Temple in Amritsar, India provides the example of a most remarkable success story of overall democratic stabilization, and federalism itself has played a key role in the ongoing business of conflict management.²⁹

Combining a statist ideology of social democratic development with the obvious need for a federal structure, the constitutional framers initially created a federation of 15 states and 6 union territories deliberately designed to cut across ethno-cultural boundaries. From 1956 onward, however, when it had become clear that the original intent of civic territorial consolidation was bound to fail, Indian federalism reinvented itself along multicultural lines. Thirteen more states were created over time and to the effect that by now only 4 of the 22 constitutionally recognized languages do not have a majoritarian territorial base. In addition, institutions for cultural self-government were created for minorities within states. At the same time, asymmetrical special-status provisions aiming at economic development via fiscal incentives and direct subsidies have strengthened allegiance to the Union.³⁰

Not all is well in the federal state of India. But the flexibility and adaptability of the Indian federal constitution not only proved resilient despite enormous challenges; it also allowed for the eventual transition from excessive centralism to a more balanced “negotiatory federalism” with “increasing—even if inchoate—respect for the states.”³¹ As not least the slum dwellers of Mumbai can attest to, federalism, even though far from magic, has embedded itself firmly as a stabilizing democratic force in the political culture of one of the world’s largest and most diverse societies.

Non-Territorial Conflict Management in Belgium

When Belgium became an independent unitary state in 1831, the elites in power established French as the official language even though 60 per cent of the population was Dutch-speaking. A century of gradual recognition of equal language

28 Malcolm L. Feeley and Edward L. Rubin, *Federalism: Political Identity and Tragic Compromise* (Ann Arbor: University of Michigan Press, 2008).

29 Balveer Arora, “Republic of India,” in Luis Moreno and César Colino (eds.), *Diversity and Unity in Federal Countries* (Montreal: McGill-Queen’s University Press, 2006), 200–26.

30 Arora, “Republic of India.”

31 Rajeev Dhavan and Rekha Saxena, “Republic of India,” in Katy Le Roy and Cheryl Saunders (eds.), *Legislative, Executive, and Judicial Governance in Federal Countries* (Montreal: McGill-Queen’s University Press, 2006), 166.

rights did little to ease the tension between the country's two principal regions, French-speaking Wallonia and Dutch-speaking Flanders. Eventually, during the 1960s, four linguistic regions were created for political-administrative purposes: the Dutch-speaking Flemish region; the French-speaking Walloon region; a small German-speaking region within the boundaries of Wallonia; and the bilingual (Dutch/French) capital region of Brussels. Four rounds of constitutional revision—1970, 1980, 1988, and 1993—finally led to the formal establishment of Belgium as a federal state.³²

The linguistic push toward federalization was reinforced by a shift in economic fortunes. Until the 1960s, a kind of balance of power had developed between the more populous Flanders and the more economically powerful Wallonia. But when Wallonia's traditional industries declined and Flanders appeared to benefit disproportionately from economic modernization strategies, the demand for cultural autonomy in Flanders was complemented by demands for autonomous control over economic matters in Wallonia. As federalization also brought with it the fact that political parties would operate entirely separately on either side of the language divide, federal legislation has become a negotiation game between two regional-linguistic camps, notably in the symmetrically bilingual Cabinet of Ministers.³³ Frequent government crises ensued. When the nationalist New Flemish Alliance (NVA) and the Walloon Socialist Party (PS) emerged as the two largest parties in their respective regions after the 2010 parliamentary elections, negotiations for a new government were deadlocked for a record 18 months.

At least for now, the promise of Belgian federalism would not seem to lie in its record of managing cultural-linguistic conflict. Even though polls do not indicate majoritarian support for outright separation in either part of the federation, the country may yet break up unless the main protagonists find yet another—and presumably more confederal—formula of constitutional revision. Instead, the promise lies in the institutionalization of a measure of non-territorial federalism that may be a model for the reformulation of federalist principles in socioculturally divided societies more generally.

The Belgian Constitution recognizes three territorial regions (Flanders, Wallonia, and Brussels–Capital) alongside three cultural communities (Dutch, French, and German). Regions and communities directly elect separate governing councils. While the regional councils exercise self-governing authority with regard to

³² Robert Senelle, "The Reform of the Belgian State," in Joachim Jens Hesse and Vincent Wright (eds.), *Federalizing Europe? The Costs, Benefits, and Preconditions of Federal Political Systems* (Oxford: Oxford University Press, 1996), 267–70.

³³ See Frank Delmartino, Hugues Dumont, and Sébastien van Drooghenbroeck, "Kingdom of Belgium," in Luis Moreno and César Colino (eds.), *Diversity and Unity in Federal Countries* (Montreal: McGill–Queen's University Press, 2010), 47–74.

public-policy issues such as the economy, employment, or housing, the cultural councils manage matters related to language and education. As allowed by the constitution, the Dutch have opted to merge both councils into one. The non-territorial aspect of the arrangement is that voters register for elections to the cultural community councils regardless of where they live. While this is relevant chiefly for the bilingual Brussels–Capital region, it provides a practical new example for an old idea: unbundling territorial governance for diverse sociocultural needs.

Trans-Border Conflict Management in Northern Ireland

Known as “the Troubles,” the conflict between Catholic Irish republicans and Protestant British unionists between the 1960s and 1990s killed close to 4,000 people and injured more than 40,000. It officially came to an end when a multiparty concord on power sharing was reached in the 1998 Good Friday Agreement. The power-sharing scheme broke down between 2003 and 2007, and sporadic violence returned. But when three British soldiers and a Northern Irish police officer were murdered by republican dissidents in 2009, Martin McGuinness, a former leader in the Irish Republican Army (IRA) and now Deputy First Minister of Northern Ireland, described the killers as “traitors to the island of Ireland.”³⁵ Nothing can drive home more powerfully the tremendous transformative success of the Good Friday Agreement, despite all the setbacks and unresolved problems.

The Good Friday Agreement consists of three parts or strands: (1) the re-establishment of devolved powers to an elected legislature, the Northern Ireland Assembly, with a mandatory power-sharing formula for the governing Northern Ireland Executive; (2) the creation of a North/South Ministerial Council for cooperation on cross-border and other common policy issues between Northern Ireland and the Republic of Ireland; and (3) the creation of two British–Irish institutions. One of those institutions is a council comprising representatives of the British and Irish governments as well as all other devolved entities in the British system—Northern Ireland, Scotland, Wales, the Isle of Man, and the Channel Islands—for regional policy cooperation; the other is an Intergovernmental Conference between the two governments for bilateral cooperation.

The heart of the Agreement is the consociational power-sharing formula between the two communities through their respective political parties. Its novelty lies in the flanking provisions involving the two neighbouring jurisdictions of the United Kingdom and the Republic of Ireland. Without these, the successful conclusion of the power-sharing agreement itself would not have

34 See Ephraim Nimni (ed.), *National Cultural Autonomy and Its Contemporary Critics* (London: Routledge, 2005).

35 Cited in Rick Wilford, “Northern Ireland: The Politics of Constraint,” *Parliamentary Affairs* 63.1 (2010): 147.

been possible. Its federal promise lies in the institutionalized organization of governance and cooperation for ethno-cultural groups and nationalities with trans-border identities and loyalties. Its immediate relevance for similar situations elsewhere is obvious: the Kashmiri region between India, Pakistan, and China; or the Kurdish region straddling the boundaries of Turkey, Syria, Iraq, and Iran.³⁶

This last observation might suggest that the promise of federalism is without limits. While this may indeed appear so in principle, the remainder of this book will provide a far more cautious tale of federalism in practice. As a form of divided and shared rule, federalism is a complicated form of governance that requires not only a high level of institutional and human capacity but also a will to federate in the first place. As we will see, while there are important points of comparison and generalizations to be made, each federation is a story in itself, shaped by its own constellation of institutional, social, cultural, economic, and political variables.³⁷ We will return to some of these issues in the concluding chapter.

³⁶ See John McGarry, "Federal Political Systems and the Accommodation of National Minorities," in Ann L. Griffiths (ed.), *Handbook of Federal Countries, 2002* (Montreal: McGill-Queen's University Press, 2002), 426–27.

³⁷ S. Rufus Davis, "The Decline of Federal Theory: The Particular Is the Reality," in Davis (ed.), *Theory and Reality: Federal Ideas in Australia, England and Europe* (St Lucia: University of Queensland Press, 1995), 21–40.

Federal Principles, Federal Organization

HAVING BEGUN THIS BOOK BY SUGGESTING some of the reasons we might be interested in federalism, we focus in this chapter on how to think about such a form of political organization. We draw some definitional boundaries, identify a few key concepts and note some of their implications, and provide some sense of the normative propositions that have become associated with federalism. Federalism has a reasonably well-defined meaning and can be distinguished quite clearly from **unitary** government on the one hand and **confederal** arrangements on the other. More philosophically, federalism can be understood as a way of approaching politics that acknowledges group identity alongside individual identity. However, it is a particular form of group identity that federalism acknowledges—a spatial, locational, or territorial one. It gives rise to a set of normative issues about the virtues and vices of a system of multiple governments, and it raises practical questions about how powers are to be divided and how relations between governments are to be defined and conducted.

What Is Federalism?

Federal states are most obviously characterized by their different levels of government. Federations comprise both an overarching national or central government and a set of regional or subnational governments: provinces in Canada, states in the United States, *Länder* in Germany, and cantons in Switzerland, for example. But France also has its *départements*, Italy its regions, and Britain its local governments—yet these countries are unitary, not federal, states. What, then, distinguishes federal from unitary political systems?

Federal vs. Unitary Systems

Let us consider two scenarios from the late twentieth century.

In 1963, the British parliament passed the *London Government Act* creating the Greater London Council (GLC) as a new level of local government for the huge metropolitan area of London. In 1985, the Conservative government of Prime Minister Margaret Thatcher abolished the GLC to eradicate a bastion of persistent Labour opposition.¹

¹ *Local Government Act 1985*. The GLC was reinstated in 2000, after the Labour Party had returned to power under Prime Minister Tony Blair.

In 1980, the Canadian government introduced an ambitious new National Energy Program (NEP) that fixed domestic oil prices and secured a larger share of the rapidly growing oil and gas revenues for itself.² This unilateral move infuriated the government of Alberta, Canada's major oil-producing province, which retaliated by imposing punitive cuts in oil shipments destined for consumers in central Canada. Much as he might have liked to, Prime Minister Pierre Trudeau could not simply abolish the renegade Western province as Thatcher had the GLC. Instead, he had to relent and negotiate a compromise. The difference separating these two cases is federalism.

The UK is a unitary state. Parliament is entirely "sovereign," holding supreme and undivided legislative authority. Local government—of which the GLC was the largest and most important example—has traditionally been entrusted with significant administrative and regulatory responsibilities. However, these powers exist only as long as, and to the extent that, parliament so decides; they are **delegated powers**, powers that in principle can be withdrawn at any time (although such a withdrawal may be politically very difficult).

A case in point is the more recent process of **devolution** in the UK. Since 1998, Scotland, Wales, and Northern Ireland have been granted their own governments, including their own legislatures and executives, with a wide range of powers not reserved to the UK parliament. Yet the UK parliament remains sovereign. In the case of Scotland, for instance, the legal basis of devolved powers is the UK parliament's *Scotland Act* of 1998, and there is merely "a convention that [the UK] government will not introduce legislation on devolved areas without the agreement of the Scottish parliament."³

By contrast, Canada is a federal state. The legislative division of powers between the national government and the provincial governments is *guaranteed* in a constitutional document. In principle, each level of government is sovereign in its own legislative sphere. Neither level of government can unilaterally alter the powers of the other. In practice, as is the case in most federations, some of these divided powers are shared or delegated from one level of government to another. But such arrangements require mutual consent and cannot be imposed by one level of government. *In a federal system of government, sovereignty is shared and powers divided between two levels of government, each of which enjoys a direct relationship with the people.* Why some states chose a federal and others a unitary form of government (see Table 2.1) will be explored in Chapter 5.

² See Robert D. Cairns, "Natural Resources and Canadian Federalism: Decentralization, Recurring Conflict, and Resolution," *Publius* 22.1 (1992): 55–70; André Plourde, "Canada," in George Anderson (ed.), *Oil and Gas in Federal Systems* (Don Mills, ON: Oxford University Press, 2012), 88–120.

³ <https://www.gov.uk/devolution-settlement-scotland>

Table 2.1 Contrasts: Some Unitary and Federal States

Unitary	Federal
United Kingdom	United States
France	Germany
Sweden	Switzerland
Netherlands	Belgium
Italy	Spain
New Zealand	Australia
China	India
Chile	Brazil

Two Tiers or Three?

In most federations there are three, not just two, levels or tiers of government. Typically, though, constitutional guarantees are not extended to the third level. Federalism has been at its heart a binary relationship between the central government and the constituent units. Local government is subordinate—existing and operating on the basis of powers delegated from the constituent units as in a unitary system. Delegated powers can be revoked or altered at any time and decisions made on the basis of delegated powers can be overturned at a higher level. This is the case in such federations as Canada, Australia, and Germany, where local government boundaries are periodically reshuffled and where the actions of local government are always liable to be overridden by their provincial, state, or *Länder* governments. Given that these federations were created by semi-sovereign political communities agreeing to form a union, this is not surprising. The US Constitution, however, does not recognize local government at all, and the states are constituted as unitary political systems.⁴ But since the nineteenth century, municipalities, counties, and townships in the US have enjoyed increasing levels of self-governing autonomy under state constitutions or laws, varying from state to state, and always liable to change at the discretion of state legislators. In addition, US federalism harbours a bewildering array of special-purpose districts, such as school districts, that are also subject to their respective state governments.

The original Swiss Constitution of 1848 also did not expressly mention the municipalities or “communes” as constituent parts of the federation—even though they enjoyed *de facto* autonomy as a fiercely defended fundamental right and were the primary level of government for granting Swiss citizenship rights.

⁴ Confirmed in the landmark case *City of Clinton v. the Cedar Rapids and Missouri River Railroad*,²⁴ Iowa Law Review 455 (1868), and known since then as “Dillon’s rule.”

The situation was rectified with the 1999 constitutional revisions. Article 50 of the Swiss Constitution now states that “the autonomy of the Municipalities is guaranteed within the limits fixed by cantonal law.” Effectively this means that “no commune can be merged with another against its political will.”⁵

A particularly intriguing case, finally, is India, where even states can be created, altered, divided or merged by central parliamentary degree. Moreover, the constitution originally provided no protection for local government—even for the traditional and venerated rural or village *panchayats*, or councils, that have been “the pivot of administration, the centre of social life, and above all, a focus of social solidarity” in rural India.⁶ In 1992, however, both rural and metropolitan local levels of government were given constitutional recognition by Amendments 73 and 74. The states are now required to create and maintain a three-tiered system of municipal government alongside the village *panchayats*, according to constitutionally prescribed government structures: municipal corporations for large urban areas, municipal councils for smaller urban areas, and so-called *nagar panchayats* for “areas in transition from a rural area to urban area.”

What this belated constitutional attention to local government arrangements shows is twofold and contradictory. On the one hand, as the Indian case demonstrates in particular, local government is increasingly taken seriously as a vital part of governance structures, providing rights and delivering services closest to the people. On the other hand, the concept of the two-tiered federal state prevails in theory and practice. In terms of federalism as a principle of pluralized, divided, and shared governance, and in light of the fact that people increasingly live in concentrated urban areas, which have more in common with each other than with the rural areas by which they are surrounded, this concept is anachronistic and points to the incompleteness of the federal construction. While central or national governments are—and are meant to be—constrained by the division of powers, state or provincial governments exercise unrestrained powers over localities.⁷

Federal or Confederal?

The genius—as well as one of the great tensions—of federalism is that it creates a balance between national and subnational governments. As we will explore later

5 Wolf Linder and Isabelle Steffen, “Swiss Confederation,” in Katie Le Roy and Cheryl Saunders (eds.), *Legislative, Executive, and Judicial Governance in Federal Countries* (Montreal: McGill-Queen’s University Press, 2006), 306.

6 George Mathew and Rakesh Hooja, “Republic of India,” in Nico Steytler (ed.), *Local Government and Metropolitan Regions in Federal Systems* (Montreal: McGill-Queen’s University Press, 2009), 166–99.

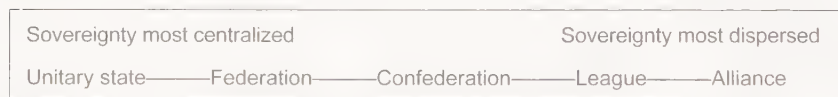
7 Roger Gibbins, “Local Governance and Federal Political Systems,” *International Social Science Journal* 53, 167 (2001): 163–70.

in this book, such a balance typically evolved out of experiences with much looser associations between constituent units. In those looser, **confederal** arrangements, member states remained the locus of sovereignty and retained the bulk of their powers, assigning a minimum of powers and responsibilities to their common government.⁸ Typically such confederal arrangements leave the central government dependent on the member states for revenue and with little scope for making domestic policy.

Some confederations were highly successful and impressively long-lived: the United Provinces of the Netherlands endured for two centuries, from 1581 to 1795; and the Swiss Republic functioned effectively for half a millennium, from 1291 to 1803. But not all confederations worked so well. The first US constitution—the *Articles of Confederation and Perpetual Union* (the *Articles*)—survived less than a decade from its ratification in 1781 to its replacement in 1789 and was dysfunctional for much of that time. Individual states acquiesced to congressional requisitions of soldiers and money, for instance, only insofar as they judged it to be in their own material interests to do so, and by 1786 they had all but ceased supplying Congress with essential funds.⁹

Confederations are more than alliances or leagues in that they do aim at the creation of some form of common governance. But they fall short of being federations for a number of reasons. The most important of these is, as the proponents of the new, more centralized US Constitution (the “Federalists”) argued at the time, that confederations receive their authority only from the member-state governments and not directly from the people.¹⁰ Consequently, they remain dependent on the states’ goodwill, cannot raise their own revenue, and can act only on the basis of unanimous agreement among all states. The American *Articles* exemplified and exposed these weaknesses in the construction of the union and thus paved the way for more durable arrangements. As Forsyth notes, “Confederations . . . are usually stepping stones to a federal state.”¹¹

Figure 2.1 The Constitutional Continuum



⁸ Murray Forsyth, *Unions of States: The Theory and Practice of Confederation* (Leicester: Leicester University Press, 1981); Frederick K. Lister, *The Later Security Confederations: The American, “New” Swiss, and German Unions* (Westport, CT: Greenwood Press, 2001).

⁹ Keith L. Dougherty, *Collective Action under the Articles of Confederation* (Cambridge: Cambridge University Press, 2001).

¹⁰ See, for example, Alexander Hamilton, *Federalist* No. 9.

¹¹ Forsyth, *Unions of States*, 208.

In principle, then, federations are distinguished from confederations by national citizenship, the direct input of citizens into both levels of government, the right of both levels of government to make laws, autonomous sources of revenue for each level of government, and the replacement of the unanimity rule by some form of more practicable majority rule. In practice, however, these distinctions may not always be so clear-cut.

The European Union (EU), for example, has a number of confederal characteristics, but is more than a confederation because significant powers have been transferred to a European level of governance. Moreover, these powers do not simply regulate the conduct and relationship of the EU member states; rather, they apply directly to individual citizens and businesses and can be enforced by the European Court of Justice. At the same time, the EU is not a fully developed or conventional federation because the member states still retain most traditional powers over domestic and foreign policy and dominate revenue collection. In addition, the union treaties that establish the scope and dimension of supranational authority cannot be changed without the consent of all member states. Thus the EU has been called a case of "confederal federalism."¹²

Centralization and Decentralization

This fundamental difference between unitary, federal, and confederal states must be distinguished from centralization and decentralization (see Table 2.2). The UK, for example, has traditionally been a rather decentralized unitary state, leaving the regulation and administration of many policy areas to local self-government. Sweden is another example of a decentralized unitary state. France, on the other hand, has been the very embodiment of a unitary and centralized state, keeping administration of the regional departments under strict national supervision.

Centralization and decentralization are likewise to be found among federal states. In Germany, most legislative powers are concentrated at the national level and, for this reason, Germany has even been called a "unitary federal state."¹³ Another of the classic federations, Australia, has also become

Table 2.2 Centralization and Decentralization in Selected Countries

	Unitary	Federal	Confederal
Centralized	France	Australia	
Decentralized	UK	Canada	United States of America 1781–89

¹² John Kincaid, "Confederal Federalism and Citizen Representation in the European Union," *West European Politics* 22.2 (1999): 55–58.

¹³ Konrad Hesse, *Der Unitarische Bundesstaat* (Karlsruhe: C.F. Müller, 1962).

highly centralized. By comparison, Canada is a notably decentralized federation. Provincial governments have aggressively resisted any erosion of their constitutional powers, and they have even been able to extend them in a number of policy areas. Switzerland has likewise resisted centralization to an unusual extent.

In short, federal systems are distinguished from unitary states by their constitutional division of powers; federal systems are distinguished from confederal ones by the way in which member states have relinquished constitutional primacy or sovereignty; and federal as well as unitary systems can be described as centralized or decentralized according to the actual distribution and allocation of powers.

Formal Federalism and Political Reality

In the next chapter, we shall identify the world's 25 formally constituted federal systems (see Table 3.1). Some of these—such as the United States, Germany, and Canada—are balanced federations in the sense that each level of government is able to perform significant tasks autonomously. But, in other cases, one might wonder whether federalism is just a formal shell without any real significance. Almost any federation has “unfederal” elements, but determining at what point those elements render it “non-federal” is difficult. K.C. Wheare, one of the great early scholars of federalism, described the Canadian Constitution as “quasi-federal” because of some notably unfederal features.¹⁴ Those features have long been a dead letter, though, and Canada is today one of the most strongly federal of all federations. Similarly, the Indian Constitution has some very unfederal features, but India must be regarded as federal in important ways. The following two cases of overly centralized federalism, Austria and Malaysia, illustrate some of the ambiguities of such analysis.

Austria is a very centralized federation, by a design dating back to the 1920s.¹⁵ Various rounds of constitutional amendment since 1945 have further exacerbated that centralization, and the central government holds virtually all policy powers. Apart from being in charge of daycare, the *Länder* are for the most part confined to the execution and administration of federal law. All efforts at federal reform and a re-balancing of powers have been stalled thus far. The main culprit seems to be the *Bundesrat* (federal council), the upper legislative chamber at the national level, whose members are elected by the *Länder* parliaments. Without exception, their voting behaviour has echoed partisan lines in the lower chamber, the *Nationalrat*, or National Council. For long periods of time, a coalition

14 K.C. Wheare, *Federal Government*, 4th ed. (Oxford: Oxford University Press, 1963), 19.

15 See Roland Sturm, “Austria,” in Ann L. Griffiths and Karl Nerenberg (eds.), *Handbook of Federal Countries, 2005* (Montreal: McGill-Queen's University Press, 2005).

government of parties with a centralist predisposition was in easy command of the two-thirds majority required in both chambers for constitutional amendments affecting the division of powers.

This reflects the degree to which Austrians see themselves as members of a single national community rather than diverse regional communities.¹⁶ Nonetheless, it may be going too far to call Austrian federalism obsolete.¹⁷ The *Länder* enjoy strong historical identities, and the execution of federal law establishing principles of administration rather than detailed directives (*Grundsatzgesetzgebung*) leaves some room for creative diversity. While the national government controls most sources of revenue, fiscal distribution and equalization are in the hands of an intergovernmental commission. The *Länder* also have more recently flexed their muscle by successfully demanding a role in decision-making regarding the European Union. Moreover, cooperative federalism is alive and well in Austria: circumventing the formal division of powers mainly for purposes of policy coordination, the *Länder* have entered into a variety of agreements with the national government as well as with each other.¹⁸

Federalism and Democracy

Even though overly centralized by design and political dynamic, Austria is still a democratic federation. By comparison, centralization in Malaysia is associated with a lack of democracy. While formally established as a federation with a bicameral legislature consisting of a House of Representatives and a Senate, the political reality is a semi-authoritarian regime skewed in favour of the Malay ethnic majority, which uses the structures of federalism for central political control. Of the 13 states, nine are ruled by hereditary sultans. These elect the head of state, who in turn appoints both the governors in the other four states and the majority of Senate members. He does this on the advice of the federal prime minister, who in turn heads a government coalition dominated by the largest Malay party. The coalition has almost always commanded an easy two-thirds majority in both legislative chambers.¹⁹ Constitutional amendments have often been pushed through in a matter of hours. One of them has been to reallocate residual powers from the states to the nation level. Since 1969, a *Sedition Act*

16 Jan Erk, "Austria: A Federation without Federalism." *Publius* 34.1 (2004): 1–20.

17 See Reinhard Rack, "Austria: Has the Federation Become Obsolete?," in Joachim Jens Hesse and Vincent Wright (eds.), *Federalizing Europe? The Costs, Benefits, and Preconditions of Federal Political Systems* (Oxford: Oxford University Press, 1996), 204–18.

18 Anna Gamper, "Republic of Austria," in Katie Le Roy and Cheryl Saunders (eds.), *Legislative, Executive, and Judicial Governance in Federal Systems* (Montreal: McGill-Queen's University Press, 2006), 71–100.

19 The BN (*Barisan Nasional*) coalition lost this two-thirds majority for the first time in the 2008 general election.

makes public discussion of Malay special rights—which include preferential recruitment of Malays into the public service—and of the status of Islam as the official religion a crime.

As in Austria and some other federations, the national government overwhelmingly controls revenue, but very much in contrast to Austria, the national government uses its fiscal control unilaterally for purposes of acquiescence and coercion in unruly states with significant non-Malay (i.e., Chinese) populations. Typically, the transfer of funds is delayed or reduced. While the states continue to exercise some autonomous functions in providing services, thus lending some legitimacy to the regime, it is not an exaggeration to describe Malaysian federalism as “minimalist” federalism.²⁰

How federalism and democracy are interrelated is a matter of considerable debate and controversy. In order to achieve what its proponents claim it can achieve—a balanced combination of large-scale governance for common problems, and particular or small-scale governance for the things that make life most worth living—federalism must be grounded in democracy and the rule of law. As Stepan has commented, “In a strict sense, only a system that is a constitutional democracy can provide credible guarantees and the institutionally embedded mechanisms that help ensure that the lawmaking prerogatives of the subunits will be respected.”²¹ The way in which an absence of democracy hollows out federal practice is also evident in the Russian case, “a ‘quasi-unitary’ state masquerading as a federation.”²²

While this association of democracy and constitutionalism holds true for most modern federal systems worthy of the name, it is not logically imperative. For example, by dividing powers among hereditary princes, giving limited authority to an elected parliament, and accommodating Prussian hegemony, the German imperial constitution of 1871 certainly did not qualify as democratic. For the time being, however, it created a federal system secured by constitutionality and adherence to the rule of law. Similarly in Yap, one of the four states in the Federated States of Micronesia, two Councils of Traditional Chiefs hold co-legislative powers alongside an elected parliament. While this contradicts modern notions of democracy, the islanders nevertheless accept it as a legitimate part of governance.

20 See William Case, “Semi-Democracy and Minimalist Federalism in Malaysia,” in Baogang He, Brian Galligan, and Takashi Inoguchi (eds.), *Federalism in Asia* (Cheltenham, UK: Edward Elgar, 2007), 124–43.

21 Alfred Stepan, “Toward a New Comparative Politics of Federalism, (Multi)Nationalism, and Democracy: Beyond Rikerian Federalism,” in Alfred Stepan (ed.), *Arguing Comparative Politics* (New York: Oxford University Press, 2001), 318.

22 Cameron Ross, “Federalism and Inter-Governmental Relations in Russia,” *Journal of Communist Studies and Transition Politics* 26.2 (2010): 165–87.

What should have become clear by now is that federalism is something both quite simple and rather complicated. On the one hand, it simply means divided government and power-sharing in countries or larger political communities that for a variety of reasons do not possess a unitary form of government. These relatively simple principles then translate into a few typical forms of organization. On the other hand, there is an almost infinite variety of federal states and federal arrangements, just as there are numerous different unitary parliamentary regimes and arrangements.

What is particularly confusing is that there is only one term, federalism, comprising both a commitment to federal principles (like liberalism, which denotes a commitment to liberal principles) and the existence of complex federal arrangements in practice (as a liberal democracy is to liberalism).²³ Collapsing these two meanings into one discourages a critical examination of how well federal practices live up to their principles. In this book, we mainly want to provide systematic guidance through the variety and diversity of federal organization. In order to do so, however, we first need to identify the principles involved.

Group Identity

Modern democratic states are universally constructed on the principle of liberal individualism—the proposition that individuals rather than groups or communities are the bearers of rights and duties and that individual liberty is the primary objective of policy. Federalism presents a modification to that principle by also giving status to communities.

Individual and Collective Identity

What liberal individualism cannot explain is why there should be nations and states in the first place. The existence of such powerful collective identities is simply taken for granted, and, except for a radically libertarian position according to which all human beings are world citizens, individual freedom and identity find their limits within the boundaries of the nation-state.

Federalism as a broad social philosophy challenges this position by assuming that forming relationships in a variety of communities is part of human nature. Belonging to one or several communities is regarded as part of individual liberty and identity. In other words, the most general principle of federalism holds that human beings possess by nature individual as well as group identities. The purpose of politics, then, is to organize and protect both individual and group liberties. The nation-state is one—and obviously one very important—community

23 One—not particularly successful—solution has been to restrict use of the term “federalism” to the idea, and to use “federation” to refer to actual practices. See Preston King, *Federalism and Federation* (London: Croom Helm, 1982), 20–21.

in which citizens find their group identity, but it is by no means the only one. Federalism responds to these assumptions by constructing political systems in which a balance is maintained between different forms of identity: individual, local, regional, national, and, increasingly, transnational.

Territorial Bias and Historical Logic

One critical weakness of the federal position becomes apparent here. Federalism is primarily conceived as an alternative to, and a critique of, the unitary nation-state, yet it only recognizes group identities that are *territorial* in nature. For that reason, federalism is seen as the chief way of accommodating “territorial cleavages.”²⁴ Sometimes federations are constructed so as to give identity groups the self-government they seek and thus, it is hoped, to placate them, as recently has been done in Ethiopia. Whether it does placate them or only feeds a desire for greater self-government or acts to buttress cleavages that might otherwise have been waning is an ongoing question.²⁵ Sometimes federations are constructed, as in the case of Malaysia, on precisely the opposite basis: with political divisions that deliberately cut across and thus hopefully neutralize such identities.²⁶ Those identities may have their basis in ethnicity, religion, language, political history, or a local way of life. At the other extreme they differentiate communities who see themselves as nations, thus giving rise to the phenomenon of “multi-nation federalism.”²⁷

Historically, this privileging of territorially based identities is understandable because in the past, localities and regions were also social communities where people were *at home*, formed most of their social relationships including marriage and kinship, and engaged in the economic exchange of goods and services. Right from the start this was problematic, though, because even the most territorially defined communities are unlikely to fit perfectly into a set of borders. While Canada’s francophone population is based in the province of Québec, there have always been francophones elsewhere in Canada—*les francophones hors-Québec*—and anglophones who live in Québec. For sheer complexity this cannot come close, though, to the challenge of federalism in countries such

24 Ugo M. Amoretti and Nancy Bermeo (eds.), *Federalism and Territorial Cleavages* (Baltimore, MD: Johns Hopkins University Press, 2004).

25 Asnake Kefale, *Federalism and Ethnic Conflict in Ethiopia: A Comparative Regional Study* (Abingdon, UK: Routledge, 2013); more generally, see Jan Erk and Lawrence Anderson, “The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions?” *Regional and Federal Studies* 19.2 (2009): 191–202.

26 Case, “Semi-Democracy and Minimalist Federalism in Malaysia.”

27 See, for example, Alain-G. Gagnon, *The Case for Multinational Federalism: Beyond the All-Encompassing Nation* (Abingdon, UK: Routledge, 2010); for a rather different perspective, see Malcolm Feeley and Edward L. Rubin, *Federalism: Political Identity and Tragic Compromise* (Ann Arbor: University of Michigan Press, 2008).

as Ethiopia, in which there are "more than eighty 'nations, nationalities and peoples,' as defined by the Constitution."²⁸

In the modern world, identities have begun to extend further beyond, or cut across, such spatial communities. In modern political discourse, they are usually identified as communities of class, gender, and ethnicity, but one can easily think of others, such as environmental groups or the entire range of special-interest organizations more generally.

Federalism and Pluralism

Federalism then differs from pluralism in two significant ways. On the one hand, it is *more* than pluralism by formally recognizing group identities as legitimate and autonomous participants in the political process. On the other hand, it is *less* than pluralism by limiting this recognition to spatial communities only. Political organization, it has been said, is the "mobilization of bias. Some issues are organized into politics while others are organized out."²⁹ Federalism tends to organize issues and conflicts of territoriality into politics, while organizing out issues and conflicts that are social in nature.

The federalist recognition of group identity in the organization of politics is therefore incomplete. It can accommodate the social concerns and identities of citizens only when these happen to coincide with regional boundaries, by pitting, for example, richer and poorer regions against one another within a federation. It does not adequately deal with the inequalities and differences that exist within regions or across regions. In other words, territorial federalism usually disregards groups of citizens who may have a common interest or identity but who live dispersed across territory rather than concentrated in one part of it.

One way in which territorial federal states have dealt with this problem is to universalize social policy in national welfare programs, leaving to regional self-government only those issues that are considered regional in nature, such as education and culture. But, given the mobility of modern life, the regional boundaries of such issues increasingly appear unclear, and the assumption of a clean separation between social and cultural issues becomes contested.

Functional Representation

Another way of dealing with this problem of social and spatial incongruity is to extend the federalist recognition of group identity to social constituencies. This has been considered occasionally in theory and practice, but it certainly is not

²⁸ Assefa Fiseha and Mohammed Habib, "Ethiopia," in Luis Moreno and César Colino (eds.), *Diversity and Unity in Federal Countries* (Montreal: McGill-Queen's University Press, 2010), 141.

²⁹ E.E. Schattschneider, *The Semisovereign People: A Realist's View of Democracy in America* (New York: Holt, Rinehart and Winston, 1960), 71.

part of the mainstream tradition of federalism and presents far greater practical difficulties.³⁰ The essence of this idea is one of **functional** rather than territorial representation. The standard argument against it is that territorial representation is all-inclusive by definition and therefore democratic at least in a formal sense, whereas functional representation either includes some groups and excludes others, opening the door to conflicts over who is in and who is out, or becomes unmanageable because unlimited numbers of groups will claim collective identity and special representative status.

But it need not be so. In Belgium, for instance, three cultural communities—Walloon (French), Flemish (Dutch), and German—have been recognized by the new constitution of 1993. They have been given self-governing powers over matters of education, language, and culture. For the exercise of these powers, the members of each community elect their own governing bodies regardless of where they live. Similarly, the idea of some form of non-territorial federalism has been proposed for Aboriginal peoples in Canada.

In the EU, governance by the Council of Ministers is complemented not only by a Committee of the Regions but also by an Economic and Social Committee comprising representatives of business, labour, and other civic organizations appointed by their national governments. These committees have only a consultative role in European decision-making, but at least they are heard. Nowhere is it suggested that functional representation could or should entirely replace territorial representation, and it is not recognized as a conventional or even desirable institutional element of federal systems. Yet it may become the solution for problems of fair representation and inclusion in divided societies. We return to these challenges and limitations in the concluding chapter.

Divided Powers

In premodern times, most people lived in small communities that were relatively autonomous and isolated from one another. There was no concept of exclusive territorial sovereignty. This situation changed with the rise of territorial absolutism from the seventeenth century onward, and the process of territorial state-building occurred gradually over several centuries. Only the Industrial Revolution eventually provided the means for effective centralization in the second half of the nineteenth century, and only then did it become necessary to redefine the plurality of peoples, regions, and communities as one homogenous body politic. Citizenship came to be defined in terms of individual rights and duties regardless of social class, region, or any other form of group identity. A powerful ideology of nationalism was forged, making one people out of societies that in reality still continued to

30 See Ephraim Nimni (ed.), *National Cultural Autonomy and Its Contemporary Critics* (London: Routledge, 2005).

live in relatively autonomous spheres of social life. For the first time in history they had to speak the same language, abide by the same laws, and use the same currency and the same weights and measures. The centralized territorial state had finally become the centralized territorial nation-state. Group identities continued to exist, of course, but they were no longer recognized as units of political self-determination.

It is this notion of unitary centralized territorial governance that federalism rejects. This should not be surprising, given the federalist commitment to group identity as a principle of social organization. As in the premodern political tradition, political power remains divided among different levels of government. Typically, the constituent units originally retained “traditional” powers over culture, language, education, and welfare. The national level of government, meanwhile, assumed responsibility for the more “modern” tasks of regulating trade and commerce, alongside such traditional ones as foreign policy and defence.

Allocation of Powers

As we shall discuss at greater length in Chapter 6, there are a number of basic ways in which powers can be divided. In the American case, only the powers given to Congress are listed, with the assumption that all other powers remain the preserve of the states. Canada chose separate lists for both levels of government and added a provision that intended, by contrast, to give **residual powers** to the central government.

Earlier constitutions—the American and the Canadian—enumerated only a relatively small number of general powers. This created problems of interpretation as well as an unintended **concurrency**. Later constitutions such as the German and Indian learned from this by making lists much more detailed and by adding specifically enumerated lists of joint or concurrent powers. Typically, in these cases, the courts have been much less involved in adjudicating power conflicts.

Subsidiarity

Dividing powers cleanly between different levels of government has proven next to impossible. As we have already seen, general welfare and good government clauses have contributed to a centralizing dynamic in most federal systems. In the case of concurrency, federal constitutions typically assign paramountcy to national legislation—with the “supremacy clause” of the US Constitution being the pioneering example. Article 31 of the German Constitution puts it most bluntly: federal law “breaks” *Land* law.

As this creeping process of centralization is unacceptable to the member states, the EU introduced the principle of **subsidiarity** in its 1993 Maastricht Treaty as an alternative method of assigning powers. And as most powers in the EU are concurrent, subsidiarity prescribes a political process of negotiated and flexible power-sharing *within* each policy field and according to specific criteria

of democracy (as close as possible to the people), efficiency (the policy objective cannot be attained by individual member-state action), and proportionality (EU action may not go beyond what is necessary to reach the objective). This again opens up room for judicial interpretation in case an agreement cannot be found.

Modernization and the Balance of Powers

If federalism means that each level of government limits the other, powers must be roughly equal or at least balanced in a meaningful way. Over time, however, most new political problems arising from processes of economic modernization have come to be defined as national problems requiring national solutions.

As a consequence, federal systems have become more centralized during the era of modern nation-state politics. Wheare's observation is no less true today than it was half a century ago: "There is one general tendency in all federal governments. . . . The general governments have grown stronger."³¹ This has occurred through generous interpretation of central government powers by the judiciary and by growing fiscal power. It has found support in the national media competing for the largest possible readership and audience; from increasingly national societies and the decline of local "loyalties";³² from "progressive" coalitions seeking to achieve nationwide reforms; from the rise of the modern Keynesian welfare state and the accompanying sense of social citizenship;³³ and from nationally oriented businesses that had come to rely on national policies and were impatient with obstacles to a single national market. As has frequently been noted, citizens do not tend to be attached to federalism *per se*, but only when it does something for them. "Opportunistic" claims on central governments from groups, interests or causes seeking their desired outcomes regardless of jurisdictional responsibilities have been an important driver of centralization.³⁴ While it may be going too far to speak of an "implosion" of federalism, the centralizing forces have been multiple, powerful, and sustained.³⁵ As we shall particularly see in Chapter 6, federal systems have typically included design features that were

³¹ Wheare, *Federal Government*, 236.

³² Jacob T. Levy, "Federalism, Liberalism, and the Separation of Loyalties," *American Political Science Review* 101.3 (2007): 459–77.

³³ Keith G. Banting, "Social Citizenship and Federalism: Is a Federal Welfare State a Contradiction in Terms?," in Scott L. Greer (ed.), *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (Basingstoke, UK: Palgrave Macmillan, 2005), 44–66.

³⁴ Troy E. Smith, "Intergovernmental Lobbying: How Opportunistic Actors Create a Less Structured and Balanced Federal System," in Timothy J. Conlan and Paul L. Posner (eds.), *Intergovernmental Management for the Twenty-First Century* (Washington, DC: Brookings Institution Press, 2008), 310–37.

³⁵ Robert E. Nagel, *The Implosion of American Federalism* (New York: Oxford University Press, 2001).

expected to provide institutional resilience in the face of such pressures; however, those features provide few guarantees.³⁶

Centralization has gone faster and further in some federations than others. In Australia, for instance, it has been quite pronounced; in Canada and Switzerland it has been much less so.³⁷ In Canada, the sustained vigour of Québec nationalism has prevented a wholesale erosion of provincial powers in the name of modernized socioeconomic efficiency, and the ownership of natural resources has provided the provinces with additional political clout more generally. Only a short while ago, this provincial resistance against the centralizing dynamic of modernization could be denounced as an “unprecedented betrayal of the national interest.”³⁸ In the meantime, a change of mind has taken place, and not only in Canada. As economic internationalization begins to curtail the sovereign powers of nation-states, regions and localities are rediscovered as important socioeconomic actors in their own right. They are the ones most directly affected by the investment and location decisions of multinational corporations and are therefore in need of strengthened rather than diminished powers over economic and social policy.

In a way, the original rationale for the division of powers in federal systems has reversed itself. On the one hand, welfare and social stability, once thought to be an obviously subnational concern, are now widely considered to be national—if not even transnational—matters set apart from cultural or other manifestations of regional diversity. On the other hand, trade and commerce, traditionally regarded as the core responsibility of national government, increasingly may require local and regional autonomy and initiative.³⁹ Particularly in the older federations, this reversal has involved a wholesale readjustment that was at certain times a great source of frustration and conflict. The apparent mismatch between how powers were assigned and the need for national action during such traumatic periods as the Great Depression led to the accusation that federalism was “obsolete.”⁴⁰ However, readjustment eventually occurred.

36 As discussed, for instance, in Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge: Cambridge University Press, 2009); cf. Dietmar Braun, “How Centralized Federations Avoid Over-Centralization,” *Regional and Federal Studies* 21.1 (2011): 35–54.

37 See Jan Erk, *Explaining Federalism: State, Society and Congruence in Austria, Belgium, Canada, Germany, and Switzerland* (London: Routledge, 2007); Alan Fenna, “The Malaise of Federalism: Comparative Reflections on Commonwealth–State Relations,” *Australian Journal of Public Administration* 66.3 (2007): 298–306.

38 Garth Stevenson, *Unfulfilled Union: Canadian Federalism and National Unity*, 2nd ed. (Toronto: Gage, 1982), Preface.

39 Paul E. Peterson, *The Price of Federalism* (Washington, DC: Brookings Institution Press, 1995).

40 As famously argued by English socialist Harold Laski, “The Obsolescence of Federalism,” *The New Republic* 98.1274 (1939): 367–69.

Constitutional Guarantees

Because it provides a legal point of reference for the division of powers as agreed to among the constituent members of a federation, a codified (“written”) constitution is an essential part of a federal system. The particular purpose of constitutions in federal systems is to spell out as precisely as possible how the powers are allocated to different levels of government and the procedures to be followed for this allocation to be altered. These principles and provisions are meant to safeguard the balance between subnational and national powers in federal systems. As we will discuss in Chapter 11, this reliance on constitutional regulation has invited an equally strong reliance on the courts for adjudication. One final issue that defies all principles of balanced political stability is secession: is federation a one-way street or can member units revoke their commitment?

Principles of Amendment

The most intricate question in any federal system is that of constitutional amendment—the question of who has the power to change the existing division of powers, to alter the terms on which the union was established. Typically in federal systems, constitutional change requires agreement of both levels of government. Powers cannot be taken away or modified without consent.

In most federal systems, this means that a majority or even super majority of the provinces, states, cantons, or *Länder* have to agree to the change—three-quarters of them in the case of the United States. In other words, constitutional change can be brought about against the will of one or a few constituent member units, but it cannot be achieved by simple majority. In particularly asymmetrical federations such as Canada, not even that is good enough, and unanimity is required for sensitive issues pertaining to the preservation of language and culture. In Switzerland and Australia, double majority requirements are in place instead. All constitutional changes have to be decided by the people themselves, in a referendum requiring not only a majority of the national population as a whole, but majorities in a majority of the cantons or states.

Federal constitutions do not guarantee the continued existence of federalism itself—though they seek to guarantee that a derogation from federal principles and even the abandonment of those principles will occur only on the basis of a broad “federal” consensus. The West German Constitution of 1949 (“Basic Law”) is an interesting example in this respect. It laid down, in Article 79, that the federal nature of the German republic could not be altered under any circumstances. Federalism in Germany, in other words, acquired the status of a fundamental and inalienable political right. In all other federations, agreement could be reached to change the constitutional form of the country from a federal to a unitary one. Given both the vested interests and powers of the governments

involved, and the commitment to federalism among most populations, that is an unlikely eventuality.

Secession

There is one issue that seems to defy the legal wisdom of constitutional guarantees: separatism or secession, the desire and right of one part of a country to sever political ties with the rest. This is not a problem restricted to federal systems, but it is a problem more innate to federalism in more than one way:

- Regionalist and separatist movements have sprung up in many unitary states since the 1960s, and federalism is routinely suggested or even introduced as a means of providing political accommodation without breaking up the country. Belgium is a case in point, and so is devolution in the UK, even though British political culture does not favour the term federalism.⁴¹ Federalism in these cases is a strategic option of holding a country together.
- The dynamic in federal systems is different. States or provinces in question already possess rights of political autonomy; their governments can promote, fuel, and channel the separatist agenda. While federalism provides a “workable alternative to secession, it also helps to make secession a more realistic alternative to federalism.”⁴² The most obvious case in point is the province of Québec in Canada, where separatist forces maintain that the constitution does not sufficiently protect and guarantee the autonomy of francophone culture and society, and where further decentralization of the federal system occurred over time mainly in order to convince a majority of Quebecers that remaining in the federation is the better option.

A normative argument can be made that having entered a federal union voluntarily, a member also should have the right to withdraw as an act of self-determination.⁴³ Yet the framers of federal constitutions have generally foreclosed the possibility of secession. As explicitly stated in the Preamble to the Australian Constitution, for instance, federations were meant to be “indissoluble.” This poses a dilemma when secessionist threats do arise in a federation:

- In Canada, after a precariously close Québec referendum on secession in 1995, the federal government asked the Supreme Court for a

⁴¹ See Martin Laffin and Alys Thomas, “The United Kingdom: Federalism in Denial?” *Publius* 29.3 (1999): 89–107.

⁴² Will Kymlicka, “Minority Nationalism and Multination Federalism,” *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (Oxford: Oxford University Press, 2001), 118.

⁴³ See Margaret Moore (ed.), *National Self-Determination and Secession* (New York: Oxford University Press, 1998).

constitutional ruling on the matter. The Court held that the rest of Canada had an obligation to negotiate with Québec if a clear majority of voters in that province elected unambiguously to separate.⁴⁴ This benchmark ruling received worldwide attention among governments dealing with their own secessionist issues. We shall discuss it more fully in Chapter 10.

- In Spain, the government of Catalonia went ahead with a “statehood” referendum in November 2014 despite a clear Constitutional Court ruling that such an action would be in violation of Section 2 of the constitution, which declares that “the Constitution is based on the indissoluble unity of the Spanish Nation.”

There are exceptions. One of those is Ethiopia, whose constitution outlines elaborate procedures for such an eventuality.⁴⁵ Another is the European Union. Since the 2009 Lisbon Treaty, the Treaty on European Union (TEU) contains a new Article 50 (1), that explicitly provides for a unilateral right of secession: “Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.” And as if taking the cue from the Supreme Court of Canada’s ruling earlier, it stipulates in Article 50 (2) that “the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal.”⁴⁶ The EU is, as we have noted, a more confederal union between countries that remain the primary locus of sovereignty. But the Canadian ruling—as well as the new EU provision—remind us that federalism is in large part about negotiation. The federal state is a negotiating state as much as it is a constitutional one.

Negotiating Compromise

To deliberate about matters of mutual concern is of course a basic principle and necessity in any plural system of politics. In origin, the word *parliament* literally means a “place to talk.” But while modern parliaments talk a lot, they do not engage in a lot of serious negotiation as long as a clear governing majority is in place. Parliamentary debates serve all kinds of useful democratic purposes—for example, providing information to the public about the positions of government and opposition, or facilitating the openness and accountability of government action through the people’s elected representatives. But this type of parliamentary talking does not typically influence legislative outcomes to any great extent.

44 *Reference re Secession of Quebec*, 2 S.C.R. 217 (1998).

45 Fiseha and Habib, “Ethiopia,” 152.

46 British prime minister David Cameron declared in January 2013 that, if re-elected, he would hold a referendum on British withdrawal from the EU by 2017.

That matter is decided behind closed cabinet doors or in coalition agreements among several governing parties, and it is often preconfigured in promises made during election campaigns. There may be formalized hearings with a multitude of interest groups as well. In the end, however, the one government in power decides and is held accountable.

Policy Coordination

Deliberation in federal systems is different. Federalism is based on the division of powers among several governments. If these all legislate without regard for the others, the result would be political chaos more often than not. The powers of federalism can hardly ever be organized into watertight compartments; they typically overlap, compete, and sometimes contradict one another. Ongoing negotiations among the different governments of a federation are therefore necessary for policy coordination in practice.

But federalism relies on deliberation in a much more fundamental sense. If the governments of a federation represent different group identities with different sets of preferences, these can only be harmonized for the sake of a shared national vision or common policy direction through negotiation, not through the administering of majority votes on the basis of rights. Negotiating legislative compromise with the goal of finding common ground for national unity and cohesion is therefore part of the federal creed.

This is obviously so in the case of culturally divided federations such as Belgium or Canada. But the need for negotiated compromise does not become irrelevant in socially homogeneous federations such as Germany or Australia. As we will discuss below, federalism is not just about accommodation of diversity; it is also about checks and balances in a regime of divided and shared governance. Self-reinforcing historical patterns of institutional design thus become part of a federal political culture more generally.⁴⁷ In the German case, for instance, the *Länder* have willingly contributed to the creation of uniform national policies even in areas where they hold exclusive powers, through their formal and generally cooperative participation in the upper-chamber *Bundesrat* of the national legislature, and through informal, so-called policy self-coordination among themselves.⁴⁸ The point, however, is not so much the outcome, a highly centralized federal system, as it is the ongoing process of negotiation and compromise that makes it acceptable.

There are two ways in which federal systems organize political deliberation between the different orders of government. As we will discuss in Chapter 8,

47 See Jörg Broschek, "Historical Institutionalism and the Varieties of Federalism in Germany and Canada," *Publius* 42.4 (2012): 662–87.

48 Erk, *Explaining Federalism*, 57–72.

federal constitutions typically make some provision for joint rule through **bicameralism**, the formal establishment of two legislative chambers at the national level. Federal bicameralism allows for a parliamentary chamber representing the popular will of the entire country (the “first chamber” or “lower house”), and a senate or council meant somehow to represent the collective interests of the subnational units (the “second chamber” or “upper house”). The other method is what is known as **intergovernmental relations**, less formalized and often entirely informal processes of policy coordination and political bargaining. As we will discuss in Chapter 9, modern federalism is characterized by dense networks of such intergovernmental relations.

Bicameralism

Federal systems characteristically have bicameral legislatures at the national level. While lower houses or first chambers are uniformly constructed on the basis of representation by population, upper houses or second chambers are commonly constructed to give the constituent units some equivalence of representation regardless of population. However, second chambers take rather different forms. The main difference is between **senate** and **council** types of representation. While senates represent subnational *populations*, councils are composed of representatives of the subnational *governments*. Regardless of population size, membership and voting rights in either case are equal, or at least weighted in favour of the smaller units. Bills have to be passed by both houses. If there are conflicting views, negotiations about some form of compromise have to take place in order to pass any legislation at all. These negotiations are typically assigned to joint committees either struck for the occasion or permanently established according to statutory regulation.

That bicameralism requires negotiated compromise should be self-evident. Not so evident is whether such compromise adequately reflects the self-governing interests and rights of the constituent units. Senate-type upper chambers fail in this regard, as popularly elected senators overwhelmingly serve party or local constituency interests rather than regional ones. Councils in turn perform better in this respect because their members represent the interests of subnational governments, which are in turn accountable to subnational populations in their collective entirety. Thus the German *Bundesrat*—alongside with the Council of Ministers in the European Union—may be regarded as the only truly federal chamber.⁴⁹

49 Werner J. Patzelt, “The Very Federal House: the German Bundesrat,” in Samuel C. Patterson and Anthony Mughan (eds.), *Senates: Bicameralism in a Contemporary World* (Columbus: Ohio State University Press, 1999), 59–92.

Subnational Bicameralism

Bicameralism is not reciprocal; that is to say, there is no participation of the national government in law-making at the subnational level. The reason is easy to see: according to the rationale of power division in federal systems, the subnational units are supposed to pass legislation on matters that pertain only to themselves, whereas the national level passes general legislation pertinent to all parts of the country.

Bicameralism may or may not be practised at the subnational level of federal systems. Neither the German *Länder*, nor the Canadian provinces, nor the Swiss cantons have upper houses; they are all unicameral. Subnational governments of that type are usually less restrained by the need for negotiating compromise than federal governments. On the other hand, with the sole exception of Nebraska, all the American states are bicameral, and, with the sole exception of Queensland, so are all the Australian states. Typically, however, these upper chambers are not designed to facilitate compromise between the general interests of states or provinces and the particular interests of the smaller communities of which they are composed, such as cities or rural districts.

Particularly in light of the responsibilities that municipalities carry in modern urbanized societies, it would be very much in line with the idea and principles of federalism to extend bicameralism to the regional level more fully and in a more meaningful way. Municipalities and rural districts could find representation in provincial second chambers, and neighbourhoods reflecting the ethnic and social mix of urban society would be represented more formally in city councils.

Intergovernmental Relations

The other way of negotiating compromise is based on intergovernmental relations. Governance on the basis of divided powers would be unthinkable without cooperation, coordination, and negotiated compromise. In all federal systems, there is an ongoing process of intergovernmental relations at all levels of government and administration, from the lower echelons of the civil service all the way up to first ministers. Intergovernmental relations were not designed into federalism, but instead have grown organically from it. And, by contrast with upper houses in most instances, intergovernmental relations have become a pivotal component of the way in which federations operate.

Communication and meetings at the staff level and among professional policy experts are the functional basis of this form of governance. Typically there are hundreds of this kind every year. However, when the ongoing intergovernmental relationships become politicized by more general disputes over the division of powers, this kind of intergovernmental or **executive federalism** becomes problematic. It then moves beyond policy coordination into the realm of bargaining over legislative agendas or even constitutional change affecting the

distribution of powers, and it moves from the hands of policy experts into those of political leadership.

Such has been the case particularly in Canada, where special ministries of intergovernmental relations have been added at both levels of government, and First Ministers' Conferences have become the focal point of intergovernmental disagreement and conflict. However, this kind of "federal-provincial diplomacy" has also resulted in intergovernmental agreements about major new policy programs, which the federal government wanted to pursue in the national interest yet could not put into place without provincial agreement because they fell within provincial power jurisdiction.⁵⁰ This shows more generally that the need for negotiated compromise in federal systems arises from the fact that constitutions are in many ways "incomplete" contracts laying out "the basic rules and incentives that structure an ongoing intergovernmental contracting process."⁵¹

Executive Federalism and Intergovernmental Variations

There may be a general need for negotiated compromise and agreement over legislative agendas affecting the balance of power between the two orders of government in all federal systems, but the extent to which and the way in which this actually happens depends on a number of factors that vary from federation to federation (see Table 2.3):

- **parliamentary vs. presidential federations:** Parliamentary federations such as Canada and Germany have developed elaborate practices of executive federalism whereby representatives of the political leaders of the two levels of government thrash out issues of cooperation and conflict. The absence of clear executive authority in presidential systems such as the

Table 2.3 Form and Function of Intergovernmental Relations (IGR) in Three Countries

	Political System	Federal Form	Power Balance	IGR
Canada	parliamentary	divided	decentralized	agreement
United States	presidential	divided	centralized	coercion
Germany	parliamentary	integrated	centralized	direct participation

⁵⁰ The classical study is Richard Simeon, *Federal-Provincial Diplomacy: The Making of Recent Policy in Canada* (Toronto: University of Toronto Press, 1972).

⁵¹ Jonathan A. Rodden, *Hamilton's Paradox: The Promise and Peril of Fiscal Federalism* (Cambridge: Cambridge University Press, 2006), 37–38.

United States precludes such direct negotiations between the two levels of government. Intergovernmental relations are for the most part relegated to matters of policy coordination and administration.

- **divided vs. integrated federalism:** In divided federations such as the United States and Canada, there is no conduit in place for subnational governments to participate in national law-making, as the members of upper chambers represent the voters of states or provinces and not their governments. Integrated federalism as practised in Germany gives the subnational governments such a conduit, in the form of the *Bundesrat*. Since most national legislation requires *Bundesrat* approval, it already contains the kind of cooperative and coordinated compromises that intergovernmental relations elsewhere have to achieve afterwards.
- **decentralized vs. centralized federal systems:** The nature of intergovernmental relations also depends on the power that subnational governments have to resist power shifts to the centre in the name of national interest. While Canadian provinces have proven resilient against such power shifts, instead forcing central executives to engage in intergovernmental power bargaining, the near supremacy of the US Congress has rendered American intergovernmental relations top-heavy and regulatory, if not outright coercive.⁵²

Social Solidarity

Perhaps the most far-reaching yet often least appreciated dimension of federalism is its inherent commitment to social solidarity. The word federalism itself comes from the Latin *foedus*, which means league, treaty, or **compact**. A social compact is not a liberal contract: it means partnership, mutual aid, and protection regardless of which part is stronger or weaker; it means compassion rather than competition. A contract in turn means exchange on the basis of market competition. Typically, you only get what you can pay for. It is liberal because you can choose whether you want to share or not. Social solidarity in federal systems is solidarity among the constituent member units, however. As Jürgen Habermas put it for the European Union, the stability of a federal union requires a measure of “civic solidarity,” which “cannot develop if social inequalities between the member states become permanent structural features.”⁵³

⁵² John Kincaid, “The Rise of Coercive Federalism in the United States: Dynamic Change with Little Formal Reform,” in Gabrielle Appleby, Nicholas Aroney, and Thomas John (eds.), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2012), 157–79.

⁵³ Jürgen Habermas, *The Crisis of the European Union: A Response* (Cambridge: Polity Press, 2012), 53.

A Compact of Sharing

The idea that different parts, endowed with different fortunes and resources, are to enter into a federal “commonwealth” implies that social sharing is an essential part of the original federal compact. This is different from the idea of the modern welfare state: in federalism, social solidarity is extended not to individuals but to spatial collectivities—regions, provinces, states, *Länder*, or cantons. This is not a trivial distinction. What the social-compact dimension of federalism guarantees is the collective social and cultural well-being of the people living in different parts of the country. The constituent members of a federal system acquire a right to economic viability and social stability.

We might ask why such a commitment would be made among members of a federation in the first place. The answer lies in the original federalist compromise between the retention of regional autonomy and the development of a national market economy. Larger markets allocate resources and generate growth more efficiently but also unevenly. The desire to enter into a federal union, and the continued support for such a union, depend on a fair distribution of that union’s benefits for all. Inherent in the federal principle, therefore, is a basic commitment to a common good. However, again, while the original rationale for this kind of solidarity may have been economic efficiency, “to compensate the smaller states for the adverse effects of federation to maintain stability of the federal union,” it is now more commonly associated with normative equity concerns: “citizens who are equal in terms of preferences and incomes should be treated the same by subnational systems of public finance, regardless of location.”⁵⁴

Modern unitary welfare states are committed to such a common solidarity as well. Moreover, as in the case of the Scandinavian welfare states in particular, they may be more egalitarian because of an individual and social, rather than territorial, bias. The idea and principle of federal social solidarity is an important one nevertheless.

Take a unitary welfare state like France, for instance. It has only one dominant cultural, economic, and political centre: Paris. Almost inevitably, a successful education and career requires relocation to Paris. Or take Italy, a unitary state with deeply entrenched regional cultures. Yet it is dominated by the much more industrialized north, which means, despite a long history of centrally administered development policies, that millions of southern Italians have had to migrate north, or even abroad, in order to make a living. Such migrations based on shifting regional opportunity structures happen in all countries, federal or unitary. By comparison, however, social solidarity and sharing in federal

54 Jeffrey D. Petchey, “Fiscal Capacity Equalization of the Australian States,” *Australian Economic Review* 44.2 (2011): 210–11.

systems are based on a multicentred approach to the distribution of public services and career opportunities. In Germany, for instance, there is no dominant centre at all, and personal careers are not dependent on whether they begin at universities in Hamburg, Frankfurt, Munich, Bonn or Berlin. To varying degrees, then, federal systems are committed to the provision of equitable life chances and living conditions in all parts.

Fiscal Redistribution and Regional Development

In principle, there are two ways in which federal systems meet this commitment. One is a **fiscal equalization** scheme whereby revenue is redistributed to “poorer” subnational governments so that they can provide equitable public services to their citizens without having to resort to higher tax rates. In Germany and Canada, the obligation to such equalization is enshrined in the constitution. The other way is the provision of public programs and grants meant to stimulate economic development in poorer regions. In the European Union, for instance, the so-called **Structural Funds** aim at regional economic and social cohesion. Neither option is without problems. While the fiscal equalization among governments pays little attention to income distribution and welfare *within* the constituent units, regional development policies may not suffice to overcome structural imbalances *between* them. Fiscal equalization may also provoke resentment among “donor” jurisdictions.

Evaluating Federalism

While federal systems have emerged for practical reasons—to accommodate diversity or retain local control within a larger union—federalism is also subject to evaluation as a mode of governance. How efficient and effective is a system of divided jurisdiction by comparison with a unitary state? Does federalism enhance or diminish democratic responsiveness and accountability?

The Virtues of a Federal System

Dividing powers and responsibilities between two levels of government has been supported as desirable on a number of grounds. There are at least six sets of arguments that can be distinguished, constituting one side of a normative debate about the virtues of federalism.

The first of these is that by dividing power between competing levels of government, federalism creates constitutional checks and balances against the abuse of that power. Defending the new US Constitution during the ratification debate in 1788–89, James Madison famously wrote:

In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence

a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.⁵⁵

According to the second argument, federalism allows for local or regional self-determination: accommodating regional diversity and providing local communities greater scope to advance their own welfare. In one of the first attempts to identify the strengths and weaknesses of federalism, visiting Frenchman Alexis de Tocqueville argued that the key advantage of federalism as he saw it in the United States is that it allows for diverse rather than uniform laws across the country. Thus the law will be adapted to the people rather than the people having to adapt to one law.⁵⁶ In addition, a division of labour between the national and state governments means that each can focus on its particular responsibilities. More locally based governments can tailor policies to local tastes. Historically different regions, for example, can have different cultural policies while still being equal parts of one large national market. Taken to its full extent, this is the argument that federalism provides arrangements necessary for peaceful coexistence in “divided societies.”

An implication of the Tocquevillian defence of federalism should be that controlling their own locally based government gives subnational communities greater ability to protect and advance their local economic interests. This may sound particularly counterintuitive in an age of globalization, but the “desired need of market integration” has in fact increased the “need for less, rather than more policy harmonization.”⁵⁷ However, this was not the thinking of the framers of classical federations, who generally thought it was best allocating trade and commerce powers to the national level.

The third argument might be summed up in the adage that “the government closest to the people governs best.” It is an argument about governmental and democratic efficacy and emphasizes the superior local knowledge and more direct accountability of subnational governments in a federation. In a large and complex modern polity, decisions should be made at the level of government with the best local knowledge. Not everything is most effectively managed from

55 Alexander Hamilton, John Jay, and James Madison, *The Federalist* (various publishers), 1787–88, No. 51. Here we use the edition edited by George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001).

56 Alexis de Tocqueville, *De la démocratie en Amérique* (1835). See *Democracy in America* (New York: Library of America, 2004), 182–83.

57 Kenneth Norrie, “Is Federalism the Future? An Economic Perspective,” in Karen Knop et al. (eds.), *Rethinking Federalism: Citizens, Markets, and Governments in a Changing World* (Vancouver: UBC Press, 1995), 149.

the centre. Citizens have more control over the governments that are closer to them, and thus democratic accountability is greatest. As the Supreme Court of Canada recently held:

Law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity.⁵⁸

The fourth argument in favour of federalism holds that by creating multiple centres of policy-making, federalism allows for much greater and less costly policy experimentation and learning. It was put forward by another early observer of the United States, this time Englishman James Bryce:

Federalism enables a people to try experiments in legislation and administration which could not be safely tried in a large centralized country. A comparatively small commonwealth like an American state easily makes and unmakes its laws; mistakes are not serious, for they are soon corrected; other States profit by the experience of a law or a method which has worked well or ill in the State that has tried it.⁵⁹

This later came to be called the **laboratory federalism thesis**, after the forceful dissenting argument by Justice Brandeis of the US Supreme Court that states be allowed to try novel policies and thereby “serve as a laboratory” for the country as a whole.⁶⁰ In Brandeis’s period the issue was new forms of economic regulation; in Canada a little bit later it was the introduction of public health insurance; and more recently in the United States it has been such innovations as the legalization of marijuana.⁶¹

A fifth argument is about the virtues of **competitive federalism**. This may refer to a relatively mild “yardstick competition,” whereby individuals in one jurisdiction can compare performance of their government against other

58 114957 *Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)* (2001), 2 SCR 241, 2001 SCC 40: 3.

59 James Bryce, *The American Commonwealth*, 3rd ed. (London: Macmillan, 1893), 393.

60 *New State Ice Co v. Liebmann* (1932), 285 U.S. 262.

61 Keith Banting, “Canada: Nation-Building in a Federal Welfare-State,” in Herbert Obinger, Stephan Leibfried, and Francis G. Castles (eds.), *Federalism and the Welfare State: New World and European Experiences* (Cambridge: Cambridge University Press, 2005), 89–137; Mitchell J. Pickerill and Paul Chen, “Medical Marijuana Policy and the Virtues of Federalism,” *Publius* 38.1 (2008): 22–55.

jurisdictions.⁶² However, it goes further than this. Multiple jurisdictions create what Hirschman described as “exit” options for citizens and businesses.⁶³ If they are sufficiently dissatisfied with the policy environment in one jurisdiction, citizens or businesses can move to another. As first identified by F.A. Hayek, this would provide governments with a “salutary check on their activities”—a virtue that appeals particularly to market liberals.⁶⁴ They argue that federalism is “market-preserving” insofar as “no government has monopoly control over economic regulation,” and therefore “must compete for [mobile] capital, labour, and economic activity by offering [different] menus of public policies.”⁶⁵

Finally, a sixth argument sees federalism as a fail-safe mechanism of governance with built-in redundancy: a mistake made at one level can be corrected at the other.⁶⁶ This argument begins from the observation, as we noted a little earlier, that federalism rarely succeeds in dividing tasks cleanly and thus results in a considerable degree of overlap. It is this overlap that provides the prophylactic redundancy. Perhaps this observation contains the most important argument in favour of federalism: far from perfect, it mirrors the complexities and ambiguities of human society. If constructed well, then, federalism can be appreciated as a system of “optimal imperfection.”⁶⁷

The Vices of a Federal System

What sounds like a great idea in principle, though, contains a number of problems in practice, and what shows up as an attribute from one point of view looks like a deficiency from another. Federalism has generated its share of criticisms, which make up the other side of a normative debate about the virtues of federalism. Virtually everything identified as a virtue of divided jurisdiction may also be viewed as a vice—or better achieved in other ways.⁶⁸ Some scholars argue that

62 Pierre Salmon, “Horizontal Competition among Governments,” in Ehtisham Ahmad and Giorgio Brosio (eds.), *Handbook of Fiscal Federalism* (Cheltenham, UK: Edward Elgar, 2006), 61–85.

63 Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations and States* (Cambridge, MA: Harvard University Press, 1970).

64 F.A. Hayek, “The Economic Conditions of Interstate Federalism,” in *Individualism and Economic Order* (London: Routledge & Keegan Paul, 1949), 268.

65 Barry R. Weingast, “The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development,” *Journal of Law, Economics, and Organization* 11.1 (1995): 5.

66 Martin Landau, “Federalism, Redundancy and System Reliability,” *Publius* 3.2 (1973): 173–96; Robyn Hollander, “Rethinking Overlap and Duplication: Federalism and Environmental Assessment in Australia,” *Publius* 40.1 (2010): 136–70.

67 George W. Downs and David M. Rocke, *Optimal Imperfection? Domestic Uncertainty and Institutions in International Relations* (Princeton, NJ: Princeton University Press, 1995).

68 Feeley and Rubin, *Federalism*.

the main “rationale” for federalism is simply “the governance of size, whether area or population.”⁶⁹

While divided jurisdiction may provide healthy limits on government power, as Madison suggested, in doing so it may just as readily obstruct policy-making and frustrate the will of the majority. Madison, after all, was most concerned about protecting the position of the privileged against the less affluent majority. “Federal government means weak government,” said A.V. Dicey many years ago, and if constitutional constraint is a merit of federalism, “it is, however, a merit which does not commend itself to modern democrats.”⁷⁰ Federalism may also permit local majorities to tyrannize over local minorities. The long history of slavery and racism in the United States is inextricably linked to federalism in that country, and thus federalism theorist William Riker liked to point out that “if in the United States one disapproves of racism, one should disapprove of federalism.”⁷¹ We shall return to the relationship between federalism and democracy in the concluding chapter.

While federalism allows self-determination and coexistence between different communities, there may be a problem in the way in which it “it entrenches, institutionalizes and perpetuates the very cleavages that it is designed to manage.”⁷² While subnational governments may indeed be closer to their citizens, they are also more vulnerable to “capture” by local interests⁷³ and prone to diverting criticism on to external scapegoats. In addition, policy-making and administration are burdened with coordination and duplication problems, and governments may jealously guard their jurisdictional prerogatives rather than compromise their powers for the larger good. Even though extolling its virtues, Tocqueville was also aware of federalism’s limitations in this regard: “Among the flaws inherent in any federal system, the most visible is the complexity of the system’s operation.”⁷⁴ Accountability, transparency, and efficiency may all be impaired as a consequence.⁷⁵

69 Jan-Erik Lane, “Models of Federalism,” *Indian Journal of Federal Studies* 11.1 (2011): 39.

70 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1915), 167, 169.

71 William H. Riker, *Federalism: Origin, Operation, Significance* (Boston: Little, Brown and Company, 1964), 155.

72 Richard Simeon, “Federalism and Social Justice: Thinking through the Tangle,” in Scott L. Greer (ed.), *Territory, Democracy and Justice: Federalism and Regionalism in Western Democracies* (Basingstoke, UK: Palgrave Macmillan, 2005), 31.

73 Kirsten Engel and Susan Rose-Ackerman, “Environmental Federalism in the United States: The Risks of Devolution,” in Daniel C. Esty and Damien Geradin (eds.), *Regulatory Competition and Economic Integration: Comparative Perspectives* (New York: Oxford University Press, 2001), 135–53.

74 Tocqueville, *Democracy in America*, 186.

75 For example, see Fred Cutler, “Government Responsibility and Electoral Accountability in Federations,” *Publius* 34.2 (2004): 19–38.

While federalism may help local communities advance their own economic interests, it may also permit an unproductive balkanization of the national economy. The idea that federalism creates “laboratories of democracy” sounds great in theory, but “it is a standard that is rarely met in practice.”⁷⁶ Competitive federalism may put governments on notice to perform; however, it privileges mobile factors of production—business and the rich—and thus pressures governments to make their policies maximally business friendly.

And finally, federalism’s built-in redundancy can easily be seen as potentially wasteful overlap and duplication coupled with endless coordination problems. Imperfection has its price.

76 Andrew Karch, *Democratic Laboratories: Policy Diffusion among the American States* (Ann Arbor: University of Michigan Press, 2007), 204; also see, *inter alia*, K Coleman S. Strumpf, “Does Government Decentralization Increase Policy Innovation?,” *Journal of Public Economic Theory* 4.2 (2002): 207–41; Brian Galle and Joseph Leahy, “Laboratories of Democracy? Policy Innovation in Decentralized Governments,” *Emory Law Journal* 58.6 (2009): 1333–400.

3

Federal Systems

A CENTURY AGO, THERE WERE A mere nine federations in the world; now there are 25 (see Table 3.1). Much of what has been called the “federalist revolution” of the twentieth century had to do with the breakdown of colonial empires and the formation of a multitude of newly independent states after 1945. As a consequence of the opportunistic and arbitrary way in which colonial powers had assembled their possessions, most of these states brought together disparate cultures and communities. Federalism seemed to be the most promising way to accommodate this incongruence of colonial territory and plural identity.

While there were some success stories (notably India), not all of these post-colonial creations endured as stable federal systems. Some—such as the United Arab States or the Federations of the West Indies—broke apart. Others—such as Libya or Indonesia—were transformed into unitary and often autocratic systems of governance. Nigeria has only recently re-emerged from military dictatorship as a fragile and very much incomplete democratic federation. And while South Africa is a belated success story with regard to its constitutional transformation into a racially inclusive democratic federation after decades of apartheid, it remains highly problematic as a functioning federation.

The twentieth century also saw the rise and fall of communism. Three of the communist states—the Soviet Union, Czechoslovakia, and Yugoslavia—had been formally constituted as federations, but they were in reality held together by party dictatorships, and they disintegrated after 1989 (see Table 3.2). While the Czech Republic and Slovakia divorced peacefully, the breakup of Yugoslavia with its multiple ethnic, religious, linguistic, and national divisions plunged the entire region into war and ongoing instability. Two new and fragile federations emerged: Bosnia and Herzegovina, and the union of Serbia and Montenegro. The latter fell apart, however, when Montenegrins opted for independence in a referendum. Stripped of its former satellite republics, Russia still remained the world’s largest federation. As can be seen in the case of Bosnia, the jury is still out on whether federalism is a stabilizing factor in a difficult phase of democratic transition and ethnic conflict.

In the Western world of industrialized nations, new federations emerged in Spain and Belgium, devolution has set the UK on a tentative course to federalization, and the European Community became the European Union and escalated its process of federalization. Because some of its member states are themselves federations, the EU also can be understood as a partial federation of federations. Such is the case with the Republic of Bosnia and Herzegovina, which comprises the Federation of Bosnia and Herzegovina as well as the highly centralized republic of Srpska.

Table 3.1 The World's Current 25 Federations in Order of Formation*

Formed before Twentieth Century	Formed during Twentieth Century
United States (1789)	Australia (1901)
Mexico (1824)	Austria (1920)
Venezuela (1830)	Germany (Federal Republic) (1948)
Switzerland (1848)	India (1950)
Argentina (1853)	[European Community (1958) / EU (1993)]
Canada (1867)	Malaysia (1963)
Germany (2nd Reich) (1871)	Nigeria (1963)
Brazil (1899)	United Arab Emirates (1971)
	Pakistan (1973)
	Spain (1978)
	Micronesia (1979)
	St. Kitts and Nevis (1983)
	Russia (1993)
	Belgium (1993)
	Ethiopia (1995)
	Bosnia and Herzegovina (1995)
	Comoros (1996)
	South Africa (1997)

* NB: This is not to say that all of these qualify as true or genuine federations, and the EU, as we emphasize throughout this book, is not yet a fully fledged federation, so it is not counted as one of the 25 federations in this table.

Table 3.2 Failed Federations

Dismembered	Became Unitary States
Soviet Union (1918–91)	Libya (1934)
Czechoslovakia (1948–92)	Indonesia (1968)
Yugoslavia (1946–91)	
United Arab States (1958–61)	
West Indies (1958–62)	
Serbia and Montenegro (1992–2006)	

How do we begin to make sense of such a rich diversity of federal experiences both new and old? The basic organizational and normative principles that set federalism apart from unitary political systems cannot be sufficient to describe and explain this bewildering array of federal systems in practice. In

this chapter, therefore, we want to provide some analytical order. First, we shall introduce some categories or criteria of federal organization. These will then be used to focus on the analytical description of a small number of basic models of federalism. Finally, we consider some contextual variables affecting institutional design and the stability of federal systems.

Analytic Criteria

Observation suggests a number of binary distinctions that can be used to classify federations. Since these are ideal types, their purpose is heuristic, and they cannot be assumed to provide a precise empirical template.

- *Rationale.* The world's federal systems have their basis in either cultural diversity or merely territorial division of powers.
- *Form of government.* A federation may take either a presidential or a parliamentary form of government.
- *Bicameralism.* Second-chamber representation can be based on either the senate or the council principle. Senators represent regional populations; council members represent regional governments.
- *Division of powers.* The mode in which powers are divided between the two levels of government is either legislative or administrative, according to whether subnational governments make their own laws or mainly implement and administer overarching national laws.

The different ways in which these features are combined in any federation will in turn influence the pattern of intergovernmental relations that prevails. Some federations are characterized by a more competitive relationship between the levels of government, others by a more cooperative one.

Cultural or Territorial Basis?

Some federations represent a compromise between different cultural communities defined by their language, religion, or, more generally, distinct cultural identities. These cases of **cultural federalism** have arisen out of the desire to build a strong union while accommodating regional difference. Examples are Switzerland, Canada, Belgium, and India.

Modern Switzerland is subdivided into seventeen German, four French, one Italian, and four plurilingual cantons. In Canada, the dividing line runs between nine predominantly anglophone provinces and the primarily francophone province of Québec. The Belgian Constitution recognizes four linguistic regions: French, Dutch, German, and the bilingual capital region of Brussels. In order to accommodate India's enormous linguistic diversity, the original 14 states created on a territorial basis according to past administrative structures have been reorganized into 28 states for the most part following linguistic boundaries.

Comprising 28 nation-states with 24 official languages, the European Union, meanwhile, represents a case of cultural federalism *par excellence*. However, with Union governance limited to agreed-upon objectives under the Treaties, cultural accommodation is not a salient issue and the style of intergovernmental relations is generally more cooperative.

The rationale of cultural federalism is the accommodation of difference. While most federations were based initially on a compromise between modernizers seeking economic advantages in a national market economy and traditionalists adamant about the retention of regional cultural autonomy, cultural differences have ceased to be the driving force of compromise in a number of federal systems. Instead, such federations have simply retained a territorial division of government.

These are cases of **territorial federalism**. In Germany, for instance, traditional cultural cleavages between the Protestant north and Catholic south are no longer relevant political factors. Neither is the once-bitter historical division between north and south in the United States of America. To varying degrees, the 16 German *Länder* and 50 American states are culturally diverse, to be sure, but this diversity is not a significant factor in how these federal systems function. The Australian federation was constructed on the basis of territorial rather than cultural principles of autonomy from its very inception. In that country, federalism brought together distinct political communities sharing a common culture, and federalism—but not federal difference—remains part of the political culture in Australia as it does in the United States.

Presidential or Parliamentary Form of Government?

While a number of hybrids now exist, the distinction between presidential and parliamentary forms of government remains fundamental to the understanding of modern systems of representative democracy. In parliamentary systems, the executive branch is formed in, and is responsible to, the legislative branch. Thus “fused” with the legislative branch, the executive also plays a strong and often dominant role in the legislative process. In presidential systems, by contrast, the executive branch is formed separately from, and is not accountable to, the legislature. Thus separated, the executive branch does not enjoy a direct role in the legislative process.

The American constitutional framers strongly believed in the idea of dispersing power among different branches of government. Constructing a system of checks and balances at the national level of government, they created a bicameral Congress with equal powers vested in the House of Representatives and the Senate, and an executive branch—the Presidency—that would derive its legitimacy directly from popular election as well. Together with the vertical division of powers between the national and state governments, this separation of powers creates a combination of multiple horizontal and vertical checks

and balances that Alexander Hamilton, John Jay, and James Madison dubbed the “compound republic” when extolling the virtues of the new constitution in the *Federalist Papers* of 1787–88. Outside of the United States, presidential forms of federalism have been restricted chiefly to Latin America.

Federalism more commonly operates in tandem with parliamentary forms of government, and several federations are embedded in the tradition of Westminster or British parliamentary government in particular. These cases of parliamentary federalism are characterized by the fusion of executive and legislative powers. Prime minister and cabinet sit on the front benches of parliament and are supported by a party majority. Typically, the upper house of the legislature is weaker by virtue of the fact that the government is formed in the lower house. The fusion of executive and legislative power also facilitates direct political bargaining between levels of government at the leadership level. The main examples are Canada, Australia, Germany, Switzerland, and India.

The European Union fits awkwardly into this distinction. On the one hand, it is certainly not a parliamentary federation. The European Parliament has a right to approve or dismiss the executive Commission in its entirety, but once appointed, Commissioners are not directly accountable to the parliamentary body. On the other hand, it is also not a presidential federation. While checks and balances exist in the form of legislative co-decision between the European Parliament and the intergovernmental Council of Ministers, as well as under the principle of subsidiarity regarding policy initiatives, the European Council (of government leaders) as the “pre-eminent political authority” of the Union¹ can exercise “considerable extra-constitutional power” over the direction of Union politics in quasi-monarchical fashion.² With regard to the Council as the dominant legislative decision-maker under the Treaties, European Union governance can best be appreciated as a novel form of **council governance**.

Senate or Council Representation?

One of the pervasive characteristics of federalism is bicameral representation at the national level of government. Typically, there is a lower house or first chamber representing the population of the entire federation and an upper house or second chamber defined as representing in some way the constituent member units—states, provinces, cantons, or *Länder*. The chief exception is Canada, which does not have a meaningfully representative second chamber at all.

1 Jeffrey Lewis, “The Council of the European Union and the European Council,” in Michelle Cini and Nieves Pérez-Solórzano Borragán (eds.), *European Union Politics*, 4th ed. (Oxford: Oxford University Press, 2013), 155.

2 Jürgen Habermas, *The Crisis of the European Union* (Cambridge: Polity Press, 2012), 44.

As we noted in Chapter 2, there are two very different kinds of second-chamber organization. One is based on the **senate principle**, whereby the people of the constituent units rather than their governments are represented in the upper house. Although commonly associated with the classical American model of federalism, it was Australia that first introduced direct popular senate elections when the federation was established in 1901. The Americans followed suit with the Seventeenth Amendment in 1913.³ In senatorial systems of bicameralism, two forms of popular representation operate in parallel. The members of the lower house jointly represent the entire population of the federation on a straightforward majoritarian basis; the members of the upper house, on the other hand, represent regional populations. They have a mandate that is as free as the mandate of lower-house members. In particular, they are not bound by instructions or any other form of guidance from state governments. The principles of vertical power division and **divided federalism** are maintained.

The underlying rationale of the senate principle is to complement the democratic principle of individual equality (one person, one vote, one value) with the principle of member unit equality. The constituent units of the federation are to be given *equal weight* in national law-making regardless of whether they are large or small. Consequently, they are represented equally in the second chamber. By comparison, representation in the lower house follows the principle of proportionality. The more populous states have more representatives and thus more votes than smaller states.

The other method of second-chamber representation is based on the **council principle**, which has its roots in the distinctive German federal tradition. The members of the German *Bundesrat*, or Federal Council, sit as delegates of the *Länder* executive governments. In accordance with the principle of **integrated federalism**, these representatives of the *Länder* participate directly in national law-making. In doing so, however, they represent the people only indirectly. Council representation also does not follow the American example of equal representation regardless of population. Instead, it is based on a formula of **weighted representation**. The larger *Länder* get more votes than smaller ones. The underlying rationale is a compromise between principles of proportionality and equality. The larger *Länder* have more voting power than the smaller ones, but even the smallest *Länder* still have more votes than they would be accorded on a proportional, per-capita basis. Votes have to be delivered *en bloc*, as instructed by the respective *Länder* governments.

The German approach to federal bicameralism has been historically unique. However, its distinctively federal quality makes it enormously

3 Before then, senators were chosen by the state legislatures.

important. From a comparative perspective, its principal significance stems from the fact that it has become the chosen form of governance in the EU, where the Council of Ministers dominates the decision-making process. The strongly federal character of this approach has also been the reason for its adoption in the new South African Constitution, as tight integration between the national and provincial governments was considered essential for post-apartheid cohesion and stability.

The rationale is clear: while senate-type upper chambers are meant to represent the *populations* of a federation's constituent units, councils are meant to represent the constituent units *as collectivities*. The rationale is not so clear when the members of upper chambers are chosen by their respective subnational legislatures, as was the case in the United States before 1913, and as still is the case in a number of federations such as India and Austria. Some federations, such as Spain, also have established mixed upper chambers, with some members directly elected and others chosen by the subnational legislatures. A final unique case is South Africa, where the delegations to the upper house include representatives of both the provincial executives (hence the council character of the upper house) and the provincial legislatures. Whether such upper chambers more likely represent popular or governmental interests depends on a number of factors, such as the strength of regional political cultures and the presence of regional political parties.

Legislative or Administrative Division of Powers?

Given that federalism is first and foremost about creating multiple levels of government, one of the most important distinctions between federations will be the approach they take to dividing powers and responsibilities between the central government and the governments of the constituent units. It turns out that there are two basic alternatives.

One we may call a **legislative division of powers**, as first devised in the original American design of **divided federalism**. This approach creates distinct national and subnational policy domains. The responsibilities of the central government typically include such overarching national concerns as monetary policy, trade and commerce, and foreign and defence policies. The responsibilities of the subnational governments include such local concerns as culture, education, physical infrastructure, and social policy. Under this system, each level of government is responsible for policy-making in its entirety—from policy initiation and formulation to legislation and on to implementation and administration. Citizens are therefore confronted with two separate strands of public administration (or three in instances of local government jurisdiction). Most federations have followed this pattern of legislative federalism.

While American or Canadian citizens must establish which level of government to go to for any particular public service, German citizens have no

such need. With few exceptions, German federalism involves only one strand of public administration. Nearly all administrative tasks in the federation are carried out by the *Länder*. As in other federations, the *Länder* are autonomous in the administration of their own exclusive legislative power. However, they are also responsible for applying most national laws and delivering most services. In doing so, they possess considerable discretion with regard to policy *execution*—that is, implementation and administration.

This is the alternative, then, which we may call an **administrative division of powers**, using conventional German terminology.⁴ Most legislative powers are concentrated at the national level, and most administrative powers have been given to the *Länder*. National legislation for the most part is **framework legislation**⁵ specifying general policy goals. On the basis of these, *Länder* legislation is focused on implementation and administration.

This administrative division of powers is a central part of Germany's **integrated federalism**. By directly participating in national framework legislation, via the *Bundesrat*, the *Länder* governments can insist on formulations and provisions that leave considerable flexibility for adoption and execution across the country. One could see this as a cooperative backward linkage in intergovernmental relations: program coordination happens before the legislative dice have been cast. Divided federal systems, by comparison, are limited to forward linkages in this sense: program coordination has to be achieved on the basis of already existing legislation.

In their quest for democratic governance and national unity, South Africans expressly chose this German path of integrated federalism with an administrative division of powers and a council-style second chamber. The South African Constitution stipulates that a system of “cooperative federalism” should prevail.⁶ Similarly in the European Union, the process of integration

4 *Verwaltungsföderalismus* (administrative federalism); see Thomas Elwein and Joachim Jens Hesse, *Das Regierungssystem der Bundesrepublik Deutschland* (Opladen: Westdeutscher Verlag, 1987), 80. It is sometimes also called *Exekutivföderalismus* in Germany—because national laws are “executed” (implemented) by the *Länder*.

5 The 2006 constitutional reforms eliminated the formal existence of framework legislation. However, this has not changed the nature of Germany's administrative federalism in substance; see Thomas O. Hueglin, “Comparing Federalisms: Variations or Distinct Models?,” in Arthur Benz and Jörg Broschek (eds.), *Federal Dynamics: Continuity, Change, and the Varieties of Federalism* (Oxford: Oxford University Press, 2013), 30–31.

6 Nicholas Hayson, “Federal Features of the Final Constitution,” in Penelope Andrews and Stephen Ellman (eds.), *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (Johannesburg & Athens, OH: Witwatersrand University Press and Ohio University Press, 2001), 504–24.

and cohesion remains driven by a spirit of cooperative intergovernmentalism as the main engine of decision-making.

The consequences of legislative divisions of power upon the nature of inter-governmental relations are not so straightforward. In a culturally divided country like Canada, competitive tensions and conflicts can arise over policy content and direction in areas of overlapping or disputed jurisdiction. In the United States, by comparison, while a pragmatic style of cooperation prevails in the administration of many joint programs, Congressional legislation has developed a dominant regulatory or even “coercive” character in the legislative pre-formulation of such programs.⁷

Models and Variations

In the real world of the 25 existing federal systems, these categories of federal organization combine in many different ways, and it would be a daunting task to sort them all in systematic fashion. Fortunately, it is possible to focus on a few paradigmatic cases.⁸

- *The American model*, characterized by presidentialism, a legislative division of powers, and a senate-type second chamber.
- *The Canadian model*, sharply differing from the American in its parliamentary form of government, but similar in its use of a legislative division of powers. The combination of parliamentarism and federalism has been the case in all other British colonies that subsequently became federations, notably Australia and India.
- *The German model* of integrated federalism, distinguished by the design of its second chamber as a council rather than senate and by its administrative division of powers. Rather than a deliberate departure from the American model, it has its roots in a continental European tradition that is considerably older than the American.
- *The EU* may be considered a model in its own right. While it is not yet a fully developed federation in the conventional sense, its inclusion is warranted insofar as it may indeed be a model character for a new type of federalism in a globalizing world.

7 John Kincaid, “Political Coercion and Administrative Cooperation in U.S. Intergovernmental Relations,” in Rekha Saxena (ed.), *Varieties of Federal Governance: Major Contemporary Models* (New Delhi: Cambridge University Press, 2011), 37–53.

8 This schema differs from Daniel Elazar’s suggestion that “There are three principal models of modern federalism; [sic] the American system, the Swiss system, and the Canadian system.” See his *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987), 42.

Table 3.3 Basic Models and Categories

Model	Rationale	Form of Government	Second Chamber	Division of Powers	Intergovernmental Relations
American	Territorial	Presidential	Senate	Legislative	Regulatory
Canadian	Cultural	Parliamentary	Senate (nominal)	Legislative	Competitive
German	Territorial	Parliamentary	Council	Administrative	Cooperative
EU	Cultural	Council governance	Council	Administrative	Cooperative

The American Model

Beginning with the American model has some analytical limitations. For good historical reasons, on the one hand, it is the model for all federal systems; it was the pioneer, the innovator. Although federalist ideas and concepts had been developed much earlier, it was the American success in transcending the conundrum of confederal government that gave the world a simple and practical blueprint to be followed in theory as well as in practice. On the other hand, American federalism has in many ways remained an exceptional case. To treat it as the main model and principal yardstick, and to judge all other federations as variations that either fulfill or fall short of the criteria it established, can easily be misleading.

Regional cultural differences between the northern “free” states and the southern “slave” states played a significant role when the American Constitution was drafted at the 1787 Philadelphia Convention. These differences were still apparent when southern Democrats and Republicans alike voted against the *Civil Rights Act* of 1964. Over the half-century since, Hispanic migration into southern parts of the United States has created a new source of regional difference on the basis of ethnicity. We nevertheless treat the United States as a case of territorial federalism because a strong ideological commitment to individual liberalism generally overrides concerns of regional or state autonomy.

Much more clearly, the American model provides the prime example of combining federalism with a presidential form of government. This combination of the division of powers between levels of government and the separation of powers between the branches of government reinforces certain features of the model generally regarded as central to federal design. The relative independence of the legislative branch from the presidential executive facilitates strong bicameralism, as we discuss in Chapter 8, and the dual mode of dividing and separating powers in turn strengthens the logic of a powerful judiciary exercising the function of judicial review, as we discuss in Chapter 11. However, “the price of a truly powerful federal senate is the creation of a truly powerful and independent presidency,”

and “the very existence of such a presidency endangers the very federalist values motivating the creation of the senate in the first place.”⁹

Congressional bicameralism is based on the senate principle. While the country as a whole is represented according to population in the House of Representatives, the states are represented in the Senate by being accorded equal numbers of seats regardless of population. The two houses have equal powers in all matters of domestic legislation. Since the introduction of direct popular elections in 1913, senators are elected by state populations and not state legislatures. For this reason, senate representation in the American model maintains the divided form of federalism. It modifies the democratic principle by adding a second manifestation of the popular will to the legislative process. But it does not contribute to intergovernmental coordination, since state governments have no direct access to the process of national law-making.

American federalism was designed around a legislative division of powers. Each level of government legislates in its own sphere of jurisdiction. However, the relatively simple formula of dividing powers in a constitution dating back to 1787 has lost much of its originally intended meaning. That meaning had been to give to Congress a limited number of explicitly enumerated powers: over trade and commerce, the monetary system, foreign affairs, and defence. Everything else was to be left to the states.

With the rise of modern socioeconomic complexity and the welfare state, Congress absorbed more and more responsibilities. Since the constitution was not amended, and could be amended only with great difficulty, Congress has relied on expansive interpretations of its existing powers by the Supreme Court. With the help of these, and on the basis of its superior revenue-raising capacities, Congress began to govern by means of a proliferating grant system that transferred funds to states and localities. As we will discuss in Chapter 7, most of these were conditionally tied to compliance with federal policy goals and objectives. The American model in its current form therefore must be characterized as one of congressional legislative supremacy.

As we will discuss in Chapter 9, governance, then, came to rely on an intensive network of intergovernmental relations, an expression often used coterminously with American federalism itself. Hundreds of grant programs require interaction and coordination at all levels of government. Inevitably, American federalism is **cooperative federalism** in this sense. Historically, the design had been focused on the constitutional separation of legislative powers as well as on competition between the two levels of government in the use of their exclusive responsibilities. But precisely because of this strictly divided constitutional form, pragmatic and

9 Bruce Ackerman, “The New Separation of Powers,” *Harvard Law Review* 113.3 (2000): 673.

cooperative intergovernmental relations had to become the hallmark of American federalism in practice.

It is important to emphasize again that this cooperation almost entirely takes place under the aegis of congressional supremacy. In return for grant money or in response to Congress's legislative supremacy, the states cooperate in the implementation and administration of national policies. There is no formal cooperation or state participation in the process of national law-making. It is for this reason that American federalism has been described more recently as having moved from a cooperative to a **regulatory** or even coercive form of intergovernmental relations at the political or legislative level.¹⁰

The American model nevertheless retains some notably decentralized characteristics. In particular, there is no formal commitment to providing American citizens with a common standard or level of public services across the country. Despite their dependence on hundreds of mostly conditional grants, the states have remained free to legislate with great variability in all areas not pre-empted by Congress in the name of national interest.

The Canadian Model

The main purpose of Canadian federation (known as "confederation") was the creation of a British North American union. Federalism was the only option for a viable political settlement between English Canada and Québec. Federal rather than consolidated union was unavoidable in Canada for cultural reasons—reasons that remain fundamental to Canadian federalism. Not unlike Americans, English Canadians tend to regard federalism as a structural device either promoting or inhibiting their individualist aspirations. Individual liberalism among French Canadians may be as strong as anywhere else, but it is complemented by a much stronger commitment to collective cultural identity; federalism is acceptable to them only if it succeeds in the promotion of individual opportunity as well as collective identity. It is the accommodation of this ambiguity that has made Canada such a difficult case of federal governance.

There is a strong sense of regional identity in other parts of the federation as well, and it is compounded by socioeconomic asymmetry. The Western provinces have resented their historical role as resource hinterlands. Piggy-backing to some extent on Québec's persistent quest for autonomy, the two westernmost provinces—Alberta and British Columbia—developed an aggressive strategy of "province-building" that includes efforts at emphasizing cultural differences more in line with American values south of the border than with the rest of the country.¹¹

10 Kincaid, "Political Coercion and Administrative Cooperation."

11 See Keith Brownsey and Michael Howlett (eds.), *The Provincial State in Canada: Politics in the Provinces and Territories* (Toronto: University of Toronto Press, 2001).

A final and perhaps most significant indicator of a cultural-regionalist rationale at the core of the Canadian federal dynamic is the lack of a national party system. Regionalist party formations competing both at the provincial and the national level have not only sprung up in Québec but also and even earlier in the West. In the case of Québec, their agenda is clearly linked to the cause of cultural self-determination. In the West, they have been expressions of protest against national policy choices dominated by the larger electoral base in central Canada.¹²

While American federalism started with a bang, as an exercise in constitutional invention, federalism in the British Dominions emerged later, in an evolutionary rather than revolutionary fashion, and as constitutional adaptation. Most importantly, the Canadian case involved an integration of federalism with the conventions of parliamentary government that, by the mid-nineteenth century, had been established as the Westminster system. Canada provided the first example of the relationship between parliamentary majority rule and federalism.

If there is anything about Canada's Senate that qualifies for model character, then it is its weakness. In parliamentary federations the lower or parliamentary chamber typically is the stronger chamber, but this asymmetry is carried to the extreme in the Canadian case. The designers of the Canadian model wrestled with the challenge of providing some form of federal, as distinct from majoritarian, representation. What they came up with was a senate that accorded the same number of senators to each of the four principal regions—Ontario, Québec, the Maritimes, and the West. However, these senators would be appointed by the federal government. This oddity of *faux* bicameralism, with a senate construction more reminiscent of the British House of Lords than its American counterpart, leaves the Canadian federal system without any effective form of provincial representation at the national level.

While the Canadian Senate formally has equal powers, its government-appointed members lack political legitimacy as equal national legislators. They may provide "sober second thought" in the legislative process, but they wisely abstain from opposing the majority will in the House of Commons. Canada's system of bicameral representation is therefore a nominal one only, and the Canadian parliament is effectively unicameral.

In this respect, therefore, the model character of Canadian federalism is limited. It has provided the first historical instance of combining federalism with parliamentary majority governance, and it has done so by giving legislative powers to a federal parliament unchecked by a horizontal separation of powers. This loyalty to the British tradition has been one of the main sources of regional

¹² See Lisa Young and Keith Archer (eds.), *Regionalism and Party Politics in Canada* (Don Mills, ON: Oxford University Press, 2002).

discontent within the Canadian federation. Ironically, it may have weakened rather than strengthened the forces of centralization in Canadian federalism because it provided the Canadian provinces with a legitimate reason to pursue their own legislative options more aggressively.

The Canadian model follows the American approach of a legislative division of powers. Each level of government is responsible for legislation, implementation, and administration within its respective sphere of jurisdiction. In order to avoid any ambiguity, however, there are two lengthy lists of powers for each level of government, and residual powers are assigned to parliament rather than to the provinces. In design, this was intended to make Canada a more centralized federation than the American approach was intended to be; however, for reasons we will explore later, this proved not to be the case.

For two main reasons, intergovernmental relations play a much more politicized role in Canada than in the United States. One is the lack of legitimate regional representation and participation at the national level; the other has to do with the much more regionalized nature of the federation. Despite the centralist intentions of its designers, the Canadian Constitution has not provided parliament with anything resembling legislative supremacy. As a consequence, the Canadian model is characterized by a need for direct political negotiations about common goals and objectives at the executive leadership level. Most prominently, these are conducted in so-called First Ministers' Conferences, chaired by the prime minister and attended by the provincial premiers. The results of these meetings then have to be approved by the respective legislatures.

This style of intergovernmental policy-making is for the most part competitive. There are competing visions about the true nature of the Canadian model, one more centralist and the other more regionalist. These fundamental differences tend to infuse First Ministers' Conferences with a sense of political drama. The competitive nature of the Canadian model is further intensified by the asymmetry of overlapping conflict lines—between the central government and the provinces; between English Canada and Québec; and between the resource-rich provinces in the West, the manufacturing heartland, and the transfer-dependent provinces in Atlantic Canada.

This is not to suggest that intergovernmental relations are always conflictual. There are also notable areas of cooperation. In contrast to the American case, the operation of Canadian federalism essentially relies on intergovernmental agreements on tax collection and program and cost sharing. For some national government programs, there are so-called opting-out provisions whereby individual provinces can run their own programs in return for a greater share of tax revenues. Such flexibility is characteristic of the Canadian model more generally. It combines a high degree of provincial autonomy with an equally high commitment to the provision of universal social-policy services and a constitutional requirement for fiscal equalization.

The German Model

While the American and Canadian models have important features in common, the German model is entirely distinctive, with very different historical origins. The federal union of 1871 was an arrangement among territorial princes under imperial Prussian hegemony. The democratic Weimar Constitution of 1919, while maintaining the federal form, hollowed out much of the traditional *Länder* autonomy. Then, under Hitler and the Nazis after 1933, Germany was transformed into a totalitarian dictatorship. And finally, when West Germany was reconstructed as a federal republic after 1945, the new Constitution was crafted under Allied supervision and American control in particular.

A new beginning under such conditions, one might assume, should have led to the adoption of the American model. But for two main reasons it did not. First, the constitution was drafted by representatives of the already re-established *Länder* governments. Second, these constitutional designers were influenced by a German federal tradition that went back much further than 1919 or even 1871. It is a tradition that is in fact older than American federalism. It is also significantly different. As Franz Gress has put it, "Germany is an old federation and a young democracy."¹³ Germany's first federal rather than merely confederal arrangement, the Second Reich of 1871, had strong cultural underpinnings. The continued popularity of Germany's dynastic rulers was closely linked to their role as benefactors of regional bourgeois societies.¹⁴

The reconstruction of West German federalism after 1945 clearly followed a rationale of territorial federalism. Cut off from the Prussian, more Protestant, and more agricultural regions in East Germany, which had fallen within the Soviet orbit, the West German republic became very homogeneous, socially as well as economically. Some of the new *Länder* boundaries were redrawn quite artificially. While following an old tradition as well as the demands of the Western Allied powers occupying the country, West German federalism was clearly meant to serve as a structural tool for democratic consolidation, as well as against any new attempts to centralize power. Despite some initial fears to the contrary, the predominantly territorial character of the German federal model was not challenged by reunification and the reincorporation of East Germany after 1990, even though there is now a more significant split of interests between rich and poor *Länder*.

13 Franz Gress, "Federalism and Democracy in the Federal Republic of Germany," in Michael Burgess and Alain-G. Gagnon (eds.), *Federal Democracies* (Abingdon, UK: Routledge, 2010), 178.

14 Because of these vested interests in the preservation of decentralized plurality, every major city in Germany today still has, for instance, its own government-subsidized concert hall and opera house, some 95 altogether.

The defining characteristic of the German model is the construction of the second chamber as a council rather than senate. The linchpin of federalism in the Bismarck Constitution of 1871 had been the *Bundesrat* (Federal Council), a dynastic upper chamber with full legislative powers. Today's *Bundesrat* is also made up of representatives from the *Länder* governments—but, of course, those governments are now democratic ones. The German *Bundesrat* thus directly represents government interests and popular interests only indirectly. This does not necessarily mean, though, that it is less democratic than a directly elected senate. German voters have learned very well to understand the impact of *Länder* elections on the composition of the *Bundesrat* and, consequently, on party competition and policy choice in Germany's bicameral system of governance.

This system of governance is complemented by an administrative division of powers that also has deep historical origins. From the very beginning, the Bismarckian arrangement had been more centralized than those of the other three federations at the time—the United States, Switzerland, and Canada. Under Prussian hegemonic pressure and Bismarck's leadership, the territorial princes consented to an ever-growing list of imperial powers. In exchange, they received or retained nearly all powers of policy implementation, allowing them to establish impressively efficient *Land* administrations—which in turn sustained the respect and loyalty of their subjects.¹⁵ In addition, of course, they also had joint control over all imperial legislation. During the years of the Weimar Republic, this control was reduced to those legislative acts particularly affecting constitutionally protected *Länder* interests, and this is how it was taken over into the postwar West German Constitution.

It is this system of interlocking powers in the national legislative process that more than anything else distinguishes the German model of integrated federalism from American- or British Dominion-style divided federalism. Most national legislation requires approval of the *Länder* governments in the *Bundesrat* before it is then implemented by the *Länder* administrations. The integrated nature of the German model finally also accounts for its highly cooperative style of policy-making, the central institution of which is parliament's so-called Mediation Committee, the purpose of which is to find legislative compromise between the two legislative chambers, the *Bundestag* and the *Bundesrat* (see Chapter 8).

In general, however, there are no fundamentally conflicting visions about German federalism between the *Länder* and national governments. The high level of centralized regulation with regard to such major policy domains as taxation

15 See Gerhard Lehmbruch, "Party and Federation in Germany: A Developmental Dilemma," *Government and Opposition* 13.2 (1978): 151–77.

and social and environmental standards also makes interregional competition less pronounced than in most other federations. Serious intergovernmental conflict may erupt only at times when different party majorities exist at the two levels of government. The opposition can then block legislation by using its combined majority of votes in the *Bundesrat*. Only on occasion have German federal governments then succeeded in breaking such blockages by striking deals with individual *Länder* governments across partisan lines. Given the increased heterogeneity of *Länder* interests since reunification, such tactics may prove successful more often.

The combination of a highly integrated form of federalism with the parliamentary practice of party competition in the German model is not always conducive to the promotion and articulation of specific *Länder* interests, however. The *Bundesrat* is not so much a second chamber of regional representation as it is an alternative chamber for the articulation of national policy priorities. Even *Länder* elections are typically fought over national issues. Voters know that a partisan change of government at the *Land* level may result in a change of the *Bundesrat* majority, which in turn may decide the fate of the national government's policy agenda.

The German model is the most tightly regulated and centralized. Given the integrated nature of the legislative process, national standards prevail in most policy fields. Tax sharing and extensive fiscal equalization are not left to political commitment but enshrined as constitutional obligations. The *Länder* governments and administrations have nevertheless maintained or even increased their status as important partners in the system.

The EU Model

At first glance, the EU's institutional arrangements look like those of a conventional federation. There are two legislative chambers—a European Parliament representing European populations on a majoritarian basis, and a Council of Ministers (officially: Council of the European Union) representing European governments. There is an executive European Commission composed and functioning much like a cabinet, and there is an independent European Court of Justice. There are also elements of a conventional division of powers, assigning matters of trade and commerce to the EU while for the most part leaving social policy to the member states.

However, even a quick glance behind this institutional façade reveals a less familiar picture. While the European Parliament now has co-decision rights in nearly all matters of legislation, the Council of Ministers still dominates the process. The Commission in turn is a government-appointed supranational executive of policy experts with a near-exclusive right of policy initiative but in command of what, by any comparative standards, is only a minuscule budget of little more than 1 per cent of the combined member-state GDPs. The

powers given to the EU also do not include what would be considered the core element of federal statehood: foreign policy and defence—although there is now an appointed High Representative for foreign affairs and security policy in charge of representing common positions. These, however, continue to depend on intergovernmental agreement with an opting-out provision for individual member states. In addition, there is the aforementioned European Council, which has now become formalized as one of the EU institutions under the 2009 Lisbon Treaty, and which continues to provide “directions and priorities” for further Union development.¹⁶

Nevertheless, because of its “unique governance” arrangements,¹⁷ and because of its genuine supranationality in a number of core policy areas, the EU can be described and appreciated as an emerging federal system with model character in its own right. The EU’s intermediate qualities have given rise to a number of characterizations, including “confederal federalism,” a “postmodern confederation,” and a “supranational federation.”¹⁸

Since the EU is currently composed of 28 member states with different histories, large variations in their social, legal, and economic systems, and different languages, it must be regarded as a case of cultural federalism. Its formation at the European level resembles the history of federal union at the national level in the nineteenth century. Its rationale has been based on a historical compromise between a shared desire to build a large integrated market and an equally strong commitment to the retention of cultural autonomy and self-governance.

By contrast with some of the more conventional nation-state federations with cultural origins, the homogenizing forces of the market are unlikely to transform the Union into a system of territorial federalism—at least not in the foreseeable future. More likely, the EU will remain the prototype of a transnational federal system with nationally anchored multicultural characteristics. However, it is also one of the key characteristics of the Union that cultural difference is not commonly a salient issue in Union politics. While nationalism continues to play a role, national identity has been in the largest part neutralized as an issue—both

16 Article 15/1, Treaty on the European Union (TEU; consolidated version). Before 2009, council meetings were regular but informal summit meetings among government heads.

17 S. Rufus Davis, “The Unique Governance of the European Community,” in *Theory and Reality: Federal Ideas in Australia, England and Europe* (St Lucia: University of Queensland Press, 1995).

18 John Kincaid, “Confederal Federalism and Citizen Representation in the European Union,” *West European Politics* 22.2 (1999): 55–58; Giandomenico Majone, “Federation, Confederation, and Mixed Government: A EU–US comparison,” in Anand Menon and Martin Schain (eds.), *Comparative Federalism: The European Union and the United States in Comparative Perspective* (New York: Oxford University Press, 2006), 121–48; Iona Annett, “The Case of the EU: Implications for Federalism,” *Regional and Federal Studies* 20.1 (2010): 107–26.

by the limited range of integration objectives under the Treaties, and by the pragmatic acceptance of multilingualism.

The EU has evolved and developed in an incremental fashion through international treaty agreement. Typically, too, it has done so by proceeding in the opposite way from classical federations: "in Europe policy has typically preceded institution building; in other federations institution building preceded policy."¹⁹ It is for these reasons that the European form of government follows neither the presidential nor the parliamentary tradition. The European Council clearly demonstrates the treaty character of the EU and the continued reliance on negotiated agreements for its future development. Its form of government therefore may be appreciated best as a novel kind of treaty federalism.

But it is the construction of the Council of Ministers as a second legislative chamber representing the member states that gives the European model its uniqueness. In presidential systems, as we saw in the American case, checks and balances are constructed between two equally powerful legislative chambers and a directly elected chief executive. In parliamentary systems, legislative and executive powers are fused in parliament, and second or regional chambers usually are weaker. In the case of the EU, the Council is by far the most powerful decision-making body. It is the only body with full legislative powers under the Treaties, and it controls the composition of the executive Commission. The European model is therefore one of second-chamber or council governance. The composition and operation of the Council have been patterned after the German model: a chamber of emissaries rather than a chamber of elected representatives, and qualified majority voting (QMV) by means of weighted member-state votes (see Chapter 8).

At first glance, the European Union also follows the German model in its administrative division of powers: EU laws and regulations are entirely carried out and administered by the member states. But the question of how to divide powers in the EU is more complicated than in conventional federations. The EU can become active in any policy field covered by the broad objectives of the Treaties. This means that most powers are *de facto* shared powers. The member states continue to legislate, but the EU can regulate as well. If and to the extent it can is a matter of the principle of subsidiarity, which has become the conceptual as well as practical linchpin of European governance since it was inserted into the 1993 Maastricht Treaty. As we will explain more fully in Chapter 6, subsidiarity essentially means not only that the Union must demonstrate for each of its legislative or regulatory acts that individual member-state action cannot reach the common objective in a sufficient or satisfactory manner, but also that its actions must extend only as far as is necessary to reach the objective. This means

19 David McKay, *Designing Europe: Comparative Lessons from the Federal Experience* (Oxford: Oxford University Press, 2001), 130.

the old approach to dividing powers—who should do what?—is transformed into a more differentiated question: who should do how much of what?

Given these characteristics, the spirit of European member-state relations is bound to be cooperative. Of course, there are also competing national interests at work in the EU, and these are the ones that usually make the headlines in the international media. Yet, at the core of the European success story lies a tremendous predisposition for cooperation and compromise, facilitated by the partial nature of the European project. While the general goals and objectives of market integration enjoy broad support in all parts of Europe, supranationality has to date stopped short of most nationally sensitive policy fields including foreign, security, and social policy.

More importantly, the cooperative spirit of the European Union is secured organizationally by an intensive network of intergovernmental committees and conferences involving the most senior levels of the national civil services. The purpose is to reach compromise before an issue becomes politicized at the leadership level. Cooperation at the leadership level in turn is enhanced by the dual institutionalization of council governance in the Council of Ministers and the European Council. It is at the latter summit meetings that agreements have been brokered on the far-reaching treaty changes that have transformed the original Common Market into more of a federal system comprising economic and monetary union—though, as we will see in Chapter 7, that transformation has not been without its challenges.

The European model can be appreciated as an innovative and promising form of federal union for other processes and institutions of transnational integration and cooperation. The economically weaker members of the EU have certainly been given a stronger voice than in other and comparable international organizations such as the International Monetary Fund. This has resulted in a stronger focus on balancing economic integration with regional economic development and stabilization objectives than in comparable international trade organizations such as the North American Free Trade Agreement (NAFTA). Most importantly, perhaps, the European Union can be seen as a new kind of transnational federal polity, as its members have committed themselves to adherence to European law even though they retain “a monopoly on the means for a legitimate use of force.”²⁰

At the same time, the partial and economic character of the European model has thus far failed to provide a European public space in which Europeans can exercise their rights as democratic citizens. Matters of economic and monetary union have been removed from the member states’ national scrutiny and accountability without re-embedding them in a comprehensive set of European political goals and civic objectives. And, as the financial crisis ongoing since

20 Habermas, *Crisis of the European Union*.

2008 has shown, the European project has remained precariously incomplete, as monetary union stability requires political and budgetary regulation including significant measures of regional social equality that at least some of the member states are unwilling to accept.

Imitations and Variations

The United States, Canada, and Germany provide the main models of federal systems; with due caution the others can be interpreted as instances of imitation and variation. Either they have adapted one particular model to their specific needs, or they have combined elements from different models. The EU is an exception in this context. Its system of council governance is itself a variation of the German *Bundesrat* model, but it remains to be seen to what extent its idiosyncratic mix of institutions and procedures will provide a model character in a globalizing world of integration and fragmentation.

The American model has been adopted and imitated most extensively in Latin America. In terms of institutional set-up, the federal systems of Mexico, Venezuela, Brazil, and Argentina are strongly American in character—as is their choice of presidentialism rather than parliamentarism. Hispanic federalism, however, has been driven by a much more centralist dynamic as a result of these countries' colonial tradition of authoritarianism, Catholicism, and clientelism. Authoritarian parties and military dictatorships used the federal structures of regional administration as transmission belts for their nationalist projects. However, the same federalist structures have more recently become opportunity structures for democratization from below.

A surprising case of imitation is Switzerland. Although by far the oldest federation in the world, with a confederal lineage extending back to the thirteenth century, modernizing elites essentially adopted the American model of second-chamber representation when Switzerland changed from confederal to federal governance in the nineteenth century. When it did so, two features of the American model were incorporated: elements of a legislative division of powers, and a popularly elected second chamber with equal cantonal representation. While the Swiss did not opt for presidentialism, they did choose a distinctively modified form of parliamentarism. Swiss federalism then evolved as a mix of American constitutionalism, direct democracy, consociational power-sharing, and German-style administrative division of powers. All constitutional changes require approval in a popular referendum. The system of governance is not based on party competition but instead on a grand coalition of all major parties representing different ideologies as well as the linguistic and regional diversity of the country.

We speak of a Canadian model because Canada was the first federation established in the British Dominions and because it was the first to combine a federal division of powers with the retention of Westminster-style parliamentary governance. The two most prominent and subsequent cases, Australia

and India, may be seen more as falling into the “combined” category. Both followed Canada’s example of parliamentary federalism, yet both rejected Canada’s choice of a government-appointed senate. While the members of India’s upper house are chosen by the state legislatures, Australia opted for a popularly elected upper house.

Significant elements of the German model are found in the Austrian system, notably the preference for an administrative rather than legislative division of powers. As already explained, the German model of council representation has found its way into the design of council governance in the EU. More recently, South Africa has adopted the council model in its first post-apartheid democratic constitution as well. The reason is similar for all three cases. In Germany, the *Bundesrat* model first evolved from agreement among dynastic rulers. In the EU, council governance similarly was the outcome of intergovernmental agreement among its sovereign member states. And in South Africa, the choice of a “National Council of Provinces” rather than a senate-type regional chamber was meant to reflect the need for reconciling the continued presence of strong tribal leadership at the regional level with the desire to give the country a unified policy framework.

Contextual Variables

These categories and models of federalism provide important information about how federal systems work, how stable they are, and what their major critical weaknesses might be.

- A competitive style of policy-making based on cultural difference and combined with a lack of regional participation in the federal legislative process, as in Canada, for instance, may inevitably be a weak formula for stability.
- By comparison, the combination of interlocking legislative powers with a functionally divided system of administrative federalism in a culturally homogeneous country such as Germany may produce too much of the opposite, a formula for creeping unitarism undermining the federal balance.

But of course there are other features that affect the stability and performance of federalism. A few of these contextual variables will be discussed briefly in this section: size and population of a federation, the number of constituent units, and the degree of demographic and socioeconomic asymmetry.

Size and Population

Federations vary enormously in geographic and demographic size, and there seems to be no general pattern that would make stability predictable. The

United States and Australia obviously are geographically large and stable federations, with the American Civil War and Western Australian separatism in the distant past. Canada, by comparison, is also very large geographically but has been threatened by Québec secession much more recently. Austria is a very small and entirely stable federation. So is Switzerland, one would think, with a population of some eight million people sorted into a large number of more than 20 cantons. Yet in 1979 a separatist movement succeeded in splitting the canton of Berne, and still in 1996 another national referendum became necessary, allowing the municipality of Vellerat to switch from German-speaking Berne to the new French-speaking canton of Jura.

Of the world's eight largest states—Russia, Canada, China, the United States, Brazil, India, Australia, and Argentina—seven are formally constituted as federations, and the eighth, China, is increasingly regarded as showing signs of *de facto* federalization.²¹ Intuitively, one would assume that countries of this magnitude cannot be governed, at least not democratically, without some form of federalism. Conversely, however, one might argue that for the very same reasons—size and diversity—federalism is not enough. Federalism is based on a balance of powers between two levels of government. Across vast distances and differences of continental dimensions, even the most perfect set-up of a constitutional balance of powers may be upset by centrifugal forces.

But what are the other means holding these federal systems together? In the case of the Hispanic federations in the Americas, the long-standing practices of administrative centralism and clientelism may have provided the glue. A similar argument can be made for India. While closely following the Canadian model, the cohesion of Indian federalism at least during the early years in no small part depended on corrupted and clientelist central party governance. Now, after the restructuring of Indian states along cultural-linguistic lines and the rise of strong regional parties, a more genuinely federalist balance seems to be taking hold.²² In Russia, the successor state of the old Soviet Union, communist centralism has been replaced with new forms of oligarchic authoritarianism that disqualify the country from consideration as a functioning federal system.

It may come as a surprise that similar arguments can be—and must be—made with regard to two of the most indisputably democratic large federations, the United States and Canada. The stability of the American polity in large part rests not on federalism but on the exceptionally conformist ideological mix of liberal

21 Yongnian Zheng, "China's de Facto Federalism," in Baogang He, Brian Galligan, and Takashi Inoguchi (eds.), *Federalism in Asia* (Cheltenham, UK: Edward Elgar, 2007).

22 See Akhtar Majeed, "Republic of India," in John Kincaid and G. Alan Tarr (eds.), *Constitutional Origins, Structure, and Change in Federal Countries* (Montreal: McGill-Queen's University Press, 2005), 180–207.

individualism and nationalism that permeates the institutions and processes of federalism at all levels of government. In Canada, by contrast, stability has been periodically threatened because some, if not all, of these cohesive elements are weaker or missing. However, as we will see below, problems arising from its number of constituent units and socioeconomic asymmetry have probably been more profound.

Number of Units

The number of constituent units of which federations are composed currently ranges from 2 (St. Kitts and Nevis) to 50 (the United States). Some of the geographically largest federations are subdivided into only a few units (six states and two self-governing territories in Australia), while some of the smallest federations contain a large number of units (26 cantons in Switzerland). There is no general correlation between size and number of units. But there may be one between number of units and stability.

The main argument has been that a large number of units contributes to the overall stability of a federal system because it facilitates fluid coalition-building. The obvious example is the United States. At least since the Civil War, there have been no deeply entrenched regional cleavages, nor have the 50 states ever challenged the central government collectively. They are simply too many and too diverse for a unified stance against congressional supremacy. Conversely, from the perspective of the central government, it is easier to play a game of divide-and-rule. The patterns of fiscal grant transfers are so diffuse that a general sentiment of "you win some, you lose some" prevails.

By the same token, the argument can be made that a small number of units tends to strengthen those units' influence upon the overall system. The collective-action problem is mitigated and they can gang up on the central government more easily. Consider in this instance Canada, where the ten provinces have succeeded—against the original constitutional intent—in wresting considerable amounts of power from the federal government. Another case may be the EU. The original Community of Six had retained a rule of unanimity in most policy areas affecting vital member-state interests. Subsequent rounds of enlargement forced the increased use of qualified majority decisions and consequently a more serious decline of nation-state sovereignty. Having only six units does not seem to have inoculated Australian federalism against centralization, though, which suggests numbers are a minor factor.

A final and related argument pertains to so-called bi-communal federations in which the number of the constituent interest parties is essentially reduced to two. The numbers game cannot be used for cross-cutting coalitions and compromises at all. Czechoslovakia has been the most extreme case of this kind because there were indeed only two constituent units, the Czech and Slovak Socialist Republics, inhabited by two different cultural groups who were, moreover, at

different stages of economic development. Soon after the end of communist rule, the federation broke up—even though the bi-communal differences were by no means extreme. Belgium is a country similarly divided between two cultural communities. In this case, however, the development led from a unitary state on the brink of a break-up to the creation of a troubled bi-communal federation recognizing both linguistic regions and cultural communities.

And finally, there is Canada again, not a bi-communal federation in terms of numbers, but deeply divided between the anglophone community mainly living in nine provinces and the francophone community predominantly living in Québec. The fact that there are more than two constituent member units has not helped to disperse the bi-communal conflict. On the contrary, Québec's main grievance in the Canadian federation is that it is permanently outnumbered. This, however, is as much a problem of asymmetry as of bi-communalism.

Asymmetry

To have the constitutional status of equals assumes some underlying equalities. Where imbalances are too great, federations face ongoing challenges.

In most cases, the constituent units in federal systems are very uneven in size and population. The size of the smallest Canadian province, Prince Edward Island, amounts to less than 0.5 per cent of the largest province, Québec. The population in the smallest German *Land*, Bremen, barely reaches 4 per cent of the most populous *Land*, Nordrhein–Westfalen. If such unevenness is the norm rather than the exception, it can hardly serve as a telling indicator of stability or instability.

What does constitute a problem is the concentration of nearly, or more than, half of the population in one part or even one constituent unit of the federation. The Western provinces of Canada, for instance, routinely and understandably complain that federal elections are already decided before the polling stations in the westernmost province of British Columbia have even closed. This has to do with the time-zone differences in a vast country, but also with the fact that more than 60 per cent of Canadians live in the two central Canadian provinces of Ontario and Québec. The metropolitan areas of Toronto and Montreal alone have more inhabitants than the three prairie provinces of Manitoba, Saskatchewan, and Alberta combined. Québec, of course, feels outnumbered both by demographic (it has some 25 per cent of the Canadian population) and cultural-provincial asymmetries (nine English provinces against one French).

Equally significant are asymmetries of regional economic resources. Canada is the most conspicuous case again. Most of its manufacturing industries are located in central Canada, while the economies of the western and eastern provinces rely mainly on the extraction and export of natural resources. Agreeing upon a national industrial or energy policy under such circumstances is virtually impossible.

Economic disparities are affecting the stability of many federations, including such emerging federal systems as Spain and the EU. In Spain, Catalonia, one of the 17 autonomous communities (as the constituent units are termed), produces nearly a quarter of the national GDP. It is the combination of relative economic strength and nationalist sentiments—Catalans speak a different language and have a distinct history—that sustains Catalonia's quest for ever more autonomy, if not outright independence.

The great difference between northern and southern economic strength and development has been the main problem of economic asymmetry in the EU. While market integration brought some obvious benefits to all member states and regions, the main beneficiary has been Germany, whose positive trade balance has at times been larger than the trade deficits of all other member states combined. The introduction of a single currency has compounded the problem, as economic weakness can no longer be offset by currency devaluations.

This last section has pointed to federal systems like Canada, Spain, and the EU as particularly problematic cases of federal stability and balance. Yet the argument can also be turned around to take on a more positive note. In an increasingly globalized and interdependent world, different size, uneven numbers, and glaring asymmetries more than ever will be the contextual norm for the conduct of politics and the design of policy. If federalism can keep these polities together in cooperation or at least peaceful competition, they may indeed have model character for the future.

Three Traditions of Federal Thought

WHERE DID THE IDEA OF FEDERALISM come from? Federalism is not only a description of the way in which power and governance are sometimes organized; it is also a set of values and prescriptions about how communities should be structured. It is thus a normative proposition with its own intellectual history. At the opposite ends of a wide spectrum of opinions about those origins there are two basic positions. One holds that federalism is an American invention, a unique idea and form of government ingeniously developed out of necessity for joint survival and the organization of independent political life among the 13 colonies that had won their independence from Britain in the late eighteenth century. The other insists that the idea of federalism is as old as Western civilization and that federalism in practice existed throughout the ages, from ancient Israel and Greece down to the present day.

As usual, the truth probably lies somewhere in between these two extremes. There can be no doubt that the Americans came up with something new. The combination of a codified constitution dividing power between different levels of government, each enjoying a direct relationship with the people; the dual representation of the people in separate legislative chambers; and supervision by a supreme court was without precedent. The history of modern federal government in this sense begins with the adoption of the US Constitution in 1789 and the break with the historical practice of confederalism.

However, some of the basic ideas implemented in this constitution were much older. Federal principles and practices can indeed be traced through most of human history. Some of the city-states of ancient Greece had formed quasi-federal leagues with their military allies and trade partners. Even earlier than that, according to the Old Testament, the 12 tribes of Israel united in a covenant or federal pact after their exodus from Egypt.¹ Governance in the Holy Roman Empire of the Middle Ages very much resembled that of a confederation with overlapping powers and responsibilities. The Swiss had launched their confederation in the late thirteenth century. And before the Americans designed their epochal model of federalism, some of the Indigenous peoples of North America were living under systems of multilevel governance that were federal in character.

More generally, the world of political thought can be divided into two strands. One is based on the idea of empire, power concentration, and uniformity

¹ See Daniel J. Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987), 117.

of rule, the other on the idea of federation, power dispersal, and plurality of rule. Historical examples of the former include Persia, the Chinese and Roman empires, and the early-modern absolutist states of Western Europe. Examples of the latter include ancient Israel, medieval Europe, and the federal states that have emerged since the end of the eighteenth century. However, it would be quite misleading to pretend that these two strands have played a parallel and equally important role in the history of political thought: federal ideas were almost always overshadowed by those of absolutism and the exclusivity of state authority. Since the triumphant rise of the modern centralized nation-state in particular, political ideas of the past that were not seen as supportive of the modern state have for the most part been neglected.

This chapter draws out some of these federal ideas of the past. We do not need to go back to ancient Greece or biblical Israel, but instead we will focus on those intellectual traditions more directly associated with the rise of modern federal practice. These traditions tend to have emerged from moments in history when groups of people felt threatened by an existing or imminent regime of centralization and/or exclusion. In this vein, we will examine the following three quite different traditions:

- **consociational federalism** in the seventeenth century as the main political heritage of the Protestant Revolution;
- **republican federalism** in the eighteenth century as the great political invention of the American Revolution; and
- **socioeconomic federalism** in the nineteenth century and beyond as one of the logical consequences of the French Revolution.

Consociational Federalism in Early Modern Europe

The early modern period in European history was a period of transition. During the Middle Ages, most people lived in small communities, and collective survival was more important than individual aspiration. There were many rulers with competing and often overlapping powers. The system was held together by a grand ideology of Christian universality. For ordinary people this meant that they were not to question their place in society and that whatever happened to them was beyond their control; misery on earth would be rewarded in the kingdom to come.

The Reformation and the ensuing religious wars destroyed this complex and fragile balance of powers. The idea of a universal Christian empire with overlapping and shared spheres of authority *across* territories gave way to the idea of exclusive authority *within* territories. In the Augsburg Religious Peace Treaty of 1555, the main territorial rulers gave themselves the right to determine what should be the exclusive religious faith in their realms. Eventually, they claimed absolute authority over all public affairs. Local autonomies were

eroded as sovereign kings and princes began to reorganize their powers in absolutist states.

The Protestant Revolution

To this rise of state absolutism, Protestant minorities—in particular the Calvinists—had to take objection. It was a matter of survival. During the St. Bartholomew's Day Massacre of 1572, some 20,000 Calvinist Huguenots were murdered in France. Calvinists were brutally repressed in the Spanish Netherlands. Even across the Channel, under the new Church of England, Puritans were persecuted. These Protestant minorities became Europe's first exiled emigrant societies. They gathered in the few places that offered them security and shelter: the Calvinist Swiss cities of Basle and Geneva; the Netherlands after the success of the Dutch Revolt against Spain; and a number of smaller German territories whose dynastic rulers had turned to the Reformed faith as well. More importantly, Protestants had to find moral and political justification for survival and recognition. This meant that they had to break with the entire tradition of hierarchically organized authority. According to that tradition, there was only one God, who had in turn made the pope his sole representative on earth, and, insofar as they ruled with the pope's blessing, kings and princes represented a divine authority that could not be called into question by their subjects.

Protestants did not immediately question the divine authority of kings as such. They argued instead that a reformed world without the pope's supreme authority had in fact become a plural world in which all communities shared in the responsibility of defending the Christian faith. Consequently, if a ruler persecuted them, he or she could be seen as a tyrant disobeying God's will and forfeiting his divine right of governance. The ruler therefore could be resisted, even deposed by force. In the second part of the sixteenth century, pamphlets were published and distributed all over Europe calling for a right of resistance against tyrants.

In order to make their claim, Calvinists had to demonstrate that plurality and control of unlawful governance were consistent with Christian scripture. They found their evidence in the biblical story of the Jewish covenant that the 12 tribes of Israel entered into with God, who would protect them in return for their faith. In the interpretation of the Protestants, this covenant was a federal pact between God, people, and rulers. Rulers thus gained a right to govern the people, but the people likewise gained a right to control their rulers. Both were equally responsible for ensuring that the covenant would be upheld.

This idea—that governance is shared and mutually controlled among rulers and people—constituted a dramatic turnabout in political thought. Throughout the Middle Ages there had been the idea of one universal Christian empire. When this empire fell apart, the dominant assumption was that political stability could be established only by granting each territorial ruler the kind of

absolute authority that pope and emperor had claimed for so long over the whole. In Florence, Niccolò Machiavelli had written as early as 1513 that only a “new prince” empowered with ruthless leadership qualities could force the city’s divided factions back together again.² In France, Jean Bodin—himself almost a victim of the St. Bartholomew’s Day Massacre—gave to the world the modern definition of sovereignty by declaring, in 1576, that for the sake of peace and stability all governing power had to be “absolute and perpetual.”³ And in England a century later, Thomas Hobbes responded to the turmoil of the English Civil War by conjuring, in 1651, the powerful image of a mighty Leviathan with “indivisible” powers.⁴

In other words, these political thinkers took the idea of empire, of universal supremacy, and reapplied it internally, as a new doctrine of territorial sovereignty and absolutism. By comparison, the Protestants were compelled to search for a more complex solution. They insisted that peaceful and stable government was possible on the basis of a pact or covenant among a plurality of autonomous groups sharing the rights of sovereignty. In doing so, they could also point to a long tradition of political practice. Despite its name, the Holy Roman Empire of the Middle Ages had been a loose confederation among a plurality of dynastic rulers, kings, princes, bishops, and free cities. Famously dismissed by Voltaire as neither holy, nor Roman, nor an empire, its success was reflected not just in the three centuries it lasted, but in the then-unique degree of political participation and social opportunity it provided.⁵ Each entity had its privileges and responsibilities that could not be withdrawn. This meant, for example, that kings or princes had authority over large territories in certain matters, but that cities within these territories had their own authority to govern themselves. Citizenship and governance were plural and overlapping; negotiation and compromise were the order of the day.

It was this idea of the biblical covenant as a federal pact that became the backbone of the Reformed defence strategy. If the people were directly responsible for ensuring that the covenant with God was not violated, and therefore had a

2 Niccolò Machiavelli, *The Prince* (1532; Cambridge: Cambridge University Press, 1988), XXVI.

3 Jean Bodin, *The Six Bookes of a Commonwealth: A Facsimile Reprint of the English Translation of 1606, Corrected and Supplemented in the Light of a New Comparison with the French and Latin Texts* (1576; Cambridge, MA: Harvard University Press, 1962), I.8. Originally published as *Les Six Livres de la République*.

4 Thomas Hobbes, *Leviathan* (1651; Cambridge: Cambridge University Press, 1992), XVIII.

5 Tim Blanning, *The Pursuit of Glory: Europe 1648–1815* (London: Allen Lane, 2007), 275–78; see also Peter H. Wilson, *The Holy Roman Empire 1495–1806*, 2nd ed. (Basingstoke, UK: Palgrave Macmillan, 2011).

duty to control the lawful governance of the ruler, then the primary task was to organize the people in such a way as to put them into a position in which they could in fact perform this duty. Apart from the covenant with God, there had to be a political pact establishing the plurality of villages, towns, cities, and provinces into an organized body politic. And, since it was the duty of this body politic to watch over the lawfulness of governance right from the moment a ruler assumed his or her position, the organization of the people into a political body had to come before the establishment of government. In fact, it would be up to the organized body of the people to determine the conditions and limits of lawful governance.

Johannes Althusius

A new college for the study of federal theology was founded by a brother of William of Orange in the German town of Herborn in 1584, the same year that William, the leader of the Dutch Revolt against Spain, was assassinated. The school quickly became one of the leading Reformed centres of academic learning in Europe, attracting students from across the continent.

One of the professors at this college was **Johannes Althusius** (1557/63–1638).⁶ Althusius had studied at the main centres of Calvinist learning in Basle and Geneva. Once appointed to teach at Herborn, he managed to get himself into trouble with his colleagues by insisting that insofar as the second table of the Decalogue—commandments six through ten—was about justice, its interpretation was a matter of politics and not theology. In 1603, he published a book on politics, the *Politica*, which took up all the major issues of the time.⁷ It justified the revolt of the Reformed Netherlands against Catholic Spain and defended the plural structures of governance in the Holy Roman Empire. In particular, it attacked Jean Bodin's definition of sovereignty by declaring that anybody's right to govern was "neither supreme and perpetual, nor above the law" (IX.21).

A year later, in 1604, Althusius left Herborn to become legal advisor and chief executive officer of the city council in the northern German seaport of Emden. This wealthy city wanted him to help in its struggle against the provincial ruler, a count who aspired to transform his province into a modernized state under absolutist rule. For this, the count needed the taxes of his wealthiest subjects, but Emden's burghers did not want to pay those taxes. Althusius stayed in Emden for the rest of his long life, as a church elder as well as a combative city politician. During one particularly turbulent episode, he had the count effectively imprisoned in his own city residence. During another, he had the count's

6 See Thomas O. Hueglin, *Early Modern Concepts for a Late Modern World: Althusius on Community and Federalism* (Waterloo, ON: Wilfrid Laurier University Press, 1999).

7 Johannes Althusius, *Politica* (Indianapolis: Liberty Fund, 1995); all subsequent references will be to this edition and indicated in the text.

chancellery raided. At the same time, he published several expanded editions of his book, which soon became a kind of early-modern bestseller in Reformed circles all across Europe.

During the following age of **absolutism**, Althusius was largely forgotten, and his book was condemned by the powerful in church and state as incendiary and poison for the youth. In the late nineteenth century a German scholar, Otto von Gierke, rediscovered Althusius as the first modern theorist of federalism. From then on, his reputation has grown slowly but steadily. Federalism in Germany and in the EU can be linked to some of the principles of political organization he formulated.

At first glance, Althusius's theory contains only a systematic account of the old plural order that was still pretty much in existence everywhere in his time. Within the Holy Roman Empire there were independent kingdoms and principalities, and within these there were provinces and cities, which also had their own statutes of privileges and self-governing rights. The emperor was superior to all of this only insofar as he alone had the right to convoke imperial assemblies. At these periodic sessions, general laws were made that held the empire together as a whole. The main participants were the three estates—nobility, clergy, and those cities enjoying an imperial charter. Each of these estates deliberated and voted separately. The emperor's main role was to bring them to a common understanding or consent. Majority decisions were avoided, and the emperor could not prevail over the collective will of the estates. Similar assemblies existed for the smaller territories and provinces. In the cities there were municipal councils composed of representatives of the major guilds and professional colleges.

This resembled a multi-tiered federal system, not unlike the EU today. There were states, provinces, and municipalities; above them was the empire as an overarching commonwealth for specific and limited purposes. A crucial difference was that the governing rights of provinces and cities depended on imperial privilege and statutes granted from above. Another difference was that not every territory and city was included with the same set of rights.

When this system became unstable in the aftermath of the Reformation and religious wars, it was the kings and princes in the larger territories who began to transform their lands into modern states. Imperial privileges were transformed into divine and absolute rights, and the autonomy of the smaller territories and cities was eroded and replaced with principles and practices of central administration. This is what the Protestants objected to, and this is also where Althusius had to go beyond a merely systematic description of his time. Essentially, he had to demonstrate that the self-governing powers of all smaller and larger territories were natural entitlement rights, not privileges granted from above, and that they could not be changed or rescinded without their approval.

Althusius's *Politica* is a complex work eluding easy interpretation. We confine ourselves below to an examination of three concepts that are particularly

important in order to understand the federal quality of the commonwealth he had in mind: consociation, communication, and consensus.

Consociation

The *Politica* begins with a simple statement: "Politics is the art of consociating men for the purpose of establishing, cultivating, and conserving social life among them" (I.1).⁸ This may be simple, but it has far-reaching consequences for the entire conceptualization of politics.

Most early modern political thinkers, including Bodin and Hobbes, defined politics as the establishment of government authority. Of course, they were also concerned about social stability and peace, which they thought could be brought about only by undiluted state sovereignty. Consequently, the organization of society became subservient to the principles of sovereign government. Society could develop freely only insofar as these principles were not challenged. In essence, these thinkers introduced the modern distinction and separation of state and society. They saw politics as a vertical relationship between public authority and private social life.

In sharp contrast, Althusius conceptualized the essence of politics as a horizontal process of bringing people together in social harmony. He did not harbour naïve views about human nature, however. Conflict is inevitable, and it is the role of government to manage and moderate it. But Althusius was convinced that human beings will find reasonable ways of living together if they are provided with appropriate institutions allowing them to do so. And these he found in a plurality of smaller and larger communities with self-governing authority, which he called consociations. In his vision, the entire commonwealth is a federal consociation of consociations. Families are kinship consociations. In cities, we find professional consociations of guilds and colleges. Provinces are made up of many such cities and the rural areas in between. The universal commonwealth finally is composed of a plurality of provinces. Thus far, this is not terribly original, and, indeed, we can easily recognize these structures and institutions in all modern societies.

The specific federal quality of Althusius's construction comes from a number of qualifying observations. Because consociation is the most general principle of political organization, all such consociations are alike in nature. Families and guilds are as important building blocks of society as are cities or provinces. Therefore, all consociations must be recognized politically. Family interests are represented in the governing bodies of guilds and colleges; guilds and colleges are represented in city councils; cities and rural areas are represented in provincial

8 The English translation of the original Latin text uses the word *association* instead of *consociation*—which, given the central importance of this concept, is regrettably misleading.

assemblies; cities and provinces are the constituent members of the universal council or assembly of the commonwealth.

Most importantly, the entire political process is determined as bottom-up rather than top-down. There is no supreme ruler with the right to decide the scope and dimension of particular rights of self-governance; nor is the extent of such self-governance *a priori* limited by a superior *raison d'état* or, in modern terms, national interest. Defining the "national interest" is up to the constituent members of a consociation themselves.

Because "families, cities, and provinces are prior to realms, and gave birth to them" (IX.3), and because "every constituting body is prior and superior to what is constituted by it," Althusius comes to the conclusion that by "nature and circumstance the people . . . is superior to its governors" (XVIII.8). What Althusius means by "the people," however, is not a modern electorate of individual citizens. It is what he calls the organized body of the people and the ascending order of smaller and larger communities or consociations that determine the political process by interacting as collectivities.

Each level of consociation has a governing council. Its members are representatives of the smaller consociations. At the city level, for instance, they are representatives of guilds and colleges. At the provincial level, they are representatives of cities and rural districts. Provincial and city representatives in turn make up the governing assembly of the universal commonwealth. This tradition of **indirect representation** still lives on in the German model of federalism, where the members of the second chamber, the *Bundesrat*, represent the governments of the *Länder*. At the time of Althusius, of course, before the advent of modern parliamentary democracy, there was no first or popular legislative chamber equivalent to the German *Bundestag*. The Althusian model therefore can be characterized as one of second-chamber council governance.

Communication

In the second paragraph of his book, Althusius continues his explanation of the purpose of politics as the art of consociation. The members of a consociation "pledge themselves each to the other, by explicit or tacit agreement, to mutual communication of whatever is useful and necessary for the harmonious exercise of social life" (I.2). And a few paragraphs later, he defines communication as the mutual sharing of things, services, and rights (I.7). By things and services, Althusius means the activities and products of the social and economic life of peasants, carpenters, teachers, public servants, and so on. By rights, he means the law of consociation including the law of governance. For each level of consociation, there are general principles of lawfulness common to all and then particular bodies of law specific to the nature of the consociation.

This, too, is a tradition that lived on in the German model of administrative federalism. By contrast with the American model, powers are not divided in

such a way as to create autonomous spheres of jurisdiction for each level of government. Instead, powers are divided by degree of generality. Within each policy field, general or framework laws are made by the larger consociational units, while more detailed executive laws and regulations are left to the smaller units according to their specific needs and circumstances. Communication in this context denotes a political process whereby these smaller units participate in the formulation of the more general laws governing them collectively. This is the essence of the council principle, of which the EU provides the most obvious example today. In the Council of Ministers, the member states collectively decide upon the scope and dimension of European framework legislation.

Communication gives expression to a deliberative character of the political process more generally. By contrast with the American model of federalism, rights and obligations are not inscribed in constitutional stone. They remain more fluid arrangements based on agreement, and they can be adapted more flexibly to changing times and circumstances. Federations such as Germany and Switzerland that have followed this tradition tend to amend their constitutions more frequently and pragmatically.

Finally, communication in the Althusian sense points to an understanding of political legitimacy that is quite distinct from the modern notion of procedural legality. The legitimacy of a particular political decision or behaviour is not primarily tied to preconceived norms and procedures, even if these are widely recognized and traditionally accepted. Instead, political legitimacy requires a particular quality of such norms and procedures. They must allow for a common understanding among a plurality of participants with distinct interests and needs. And this common understanding requires a continuous process of communication and deliberation.

For Althusius, politics is not a superstructure of norms and institutions separate from social life; it is part of the communication of goods, services, and rights. Politics is communicative action embedded in the entirety of social life. This is particularly important for federalism, which is based on the assumption that particular communities—or consociations—continue to exist autonomously within a larger union. According to Althusius, they can do so only if they are actively involved in the decisions governing that union.

Consensus

Ultimately, consensus means that a particular community cannot be overruled by a majority of others. Modern federal systems have responded to this **consensus requirement** by means of bicameralism. In a second legislative chamber, subnational units are represented regardless of size and population—either equally, or at least by giving the smaller ones additional weight. In addition, constitutional change typically requires some form of super majority in both houses and/or ratification by a substantive majority of subnational legislatures.

At the time of Althusius, consensus was a much more fundamental prerequisite for autonomy and survival. The Holy Roman Empire was a very heterogeneous community of communities, and there was no overriding national interest in the modern sense. Cultural and religious differences alone did not permit majority decisions on most matters. Collective action, including such matters as raising taxes for the imperial administration in particular, could come about peacefully only on the basis of agreement. This situation can be compared to the predominantly francophone province of Québec in Canada, where constitutional amendments to certain matters of language and culture require the consent of the provincial legislature. In these matters, in other words, Québec cannot be overruled. Similarly, in the EU, where the interests of the member states still prevail over a sense of European identity, constitutional amendments are in reality treaty changes requiring the approval of all members.

Althusius has a very simple explanation for this consensus requirement: "What touches all ought also to be approved by all" (I.20). Althusius gives this old Roman law dictum new and more precise meaning by distinguishing between two types of political decisions: "The decision may be made according to the judgments of the more numerous or larger part in the things that concern all . . . [constituent members of a federation] together, but not in those that concern them separately" (VIII.70). And if the latter principle appears violated in a substantive and existential sense, a particular community may even have the right of secession (VIII.92).

This distinction between what is common to all and what is particular to each is one of the fundamental principles distinguishing federal from unitary states. In the latter is embedded a modern assumption that "the people" is essentially a homogeneous body of individual citizens who can therefore tolerate majority decisions as the most efficient way of conducting politics. Federal systems are more complex because the general will of the majority has to be balanced with the particular interests of different constituencies.

Back to the Future?

Because he lived in an early period not yet steeped in modern notions of state and society, Althusius placed more emphasis on diversity than on unity. To put it differently, his federalism was more confederal than federal. With his insistence on a deliberative political process, Althusius also introduced an early-modern understanding of subsidiarity—the principle that governance be carried out at the lowest level practicable. Because it is up to the smaller consociations to decide which powers should be delegated to the larger one, decisions are more likely to remain at the lowest practical level. The Althusian concepts of communication and consensus also suggest that the question of who should do what in a federal system cannot be decided, once and for all, by a final constitutional allocation of powers. Instead, it requires a permanent political process of negotiation and compromise according to changing times and circumstances.

In an emerging modern world of sovereign nation-states, including federal ones, this emphasis on consensus and compromise would soon be dismissed as anachronistic and inefficient, and Althusius was quickly forgotten. But there are at least three arguments suggesting why his consociational federalism may become more important again.

First, political scientists have recently pointed out that consociational practices of consensus democracy have continued to exist all along in a number of countries, including those that provided the historical evidence for Althusius, such as Germany, the Netherlands, and Switzerland.⁹ Moreover, they have provided compelling evidence that at least some of these consensus democracies can boast a public-policy record at least as efficient as, if not superior to, that found in typical majority systems such as the United Kingdom.¹⁰

Second, the EU has emerged as a political system demonstrating a number of Althusian characteristics. These include governance by the Council of Ministers, adherence to the principle of subsidiarity, and reliance on consensus as the method of changing the founding treaties. The EU can be interpreted as a case of consociational federalism.¹¹

And third, it seems that—notwithstanding globalization—the world continues to be divided into distinct communities of culture and religion. These communities will not tolerate having their particular interests overruled by global or even regional majority rule. Peaceful coexistence will be possible only on the basis of consensus and compromise, very much as Althusius suggested.

Republican Federalism in the Eighteenth Century

There is no evidence that a copy of Althusius's book sailed to the New World on the *Mayflower*. However, that voyage was largely financed by the House of Orange—a member of which also employed Althusius in Herborn. Althusius had published the second edition of the *Politica* in the Netherlands at precisely the time when many of the original Pilgrim Fathers stayed there in exile. Indeed, one of the first political documents of the New World, the New England Confederation of 1643, contained a pledge to “enter into a present Consociation amongst ourselves, for mutual help and strength in all our future concernments.”

9 See Thomas O. Hueglin, “Majoritarianism—Consociationalism,” in Roland Axtman (ed.), *Understanding Democratic Politics* (London: Sage, 2003), 61–71.

10 Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, 2nd ed. (New Haven, CT: Yale University Press, 2012).

11 Matthew J. Gabel, “The Endurance of Supranational Governance: A Consociational Interpretation of the European Union,” *Comparative Politics* 30.4 (1998): 463–75.

12 *Articles of Confederation of the United Colonies of New England (1643)*. Online at: http://avalon.law.yale.edu/17th_century/art1613.asp

Some of the radical spirit of early modern Protestantism arrived in America. It lived on in a new world of small settlement communities. More than a century later, the founding fathers of the United States of America were confronted with a much more volatile situation: the settlements had grown into populous colonies often at odds with one another; their common ties with Britain had been severed by the War of Independence; trade wars with European powers threatened their economies; the existing confederal union had proven dysfunctional; and there was grave concern about the quality of government in the individual states and the threat democracy posed to the property-owning elite. A more efficient and secure way of administering and financing their newly independent enterprise therefore had to be found. This in turn required the creation of an enhanced central government. Out of the quest for independence grew the first modern federal state.

The American Revolution

Put into motion by the foolish British refusal to grant some form of representation for tax-paying American colonists, the American Revolution became much more than secession from the home country. In 1776, 13 years before the French Revolution, the *Declaration of Independence* postulated, at least in principle, that “all men are created equal,” that they have “unalienable rights,” and that governments derive their powers from the “consent of the governed.”

Initially, the creation of a new form of government was not on their minds. A loose confederation of the 13 colonies-turned-states would do for common security and was so established under the *Articles of Confederation and Perpetual Union* in 1781. Only when this confederation proved both inefficient and ineffective did the idea take shape for a federal union with a more powerful central government. The thoroughly novel Constitution of the United States of America was thus crafted at the Philadelphia Convention in 1787 and put into effect after successful ratification in 1789.

The idea of a federal union was, of course, far from new. The framers of the US Constitution were men of great learning, familiar both with the existing alternatives to the British unitary state in Germany, the Netherlands, and Switzerland, and with historical confederacies. However, they did not like what they saw in any of those examples because all seemed to show the same inefficiency and instability of government that had plagued their own confederation since independence. So, when coming together at Philadelphia, they were keenly aware that theirs was a new world requiring new solutions, a “system without a precedent” as James Madison would put it later.¹³

13 Cited in Quentin Taylor, “‘A System without a Precedent’: The Federalism of the Federalist Papers,” in Ann Ward and Lee Ward (eds.), *The Ashgate Research Companion to Federalism* (Farnham, UK: Ashgate, 2009), 185.

For Althusius, the main motivation had been to protect and secure the religious and socioeconomic autonomy of smaller communities against the rise of territorial state absolutism already in progress. For the American framers, it was almost the opposite: the creation of efficient and stable central authority against considerable opposition from the states. In their endeavour, these framers drew some inspiration from an already existing example of federal new world governance: the Six Nations Confederacy of the Haudenosaunee, or Iroquois, which several of them had visited in upstate New York. As early as 1751, Benjamin Franklin had written that:

It would be a very strange thing if Six Nations of Ignorant Savages should be capable of forming a Scheme for such a Union and be able to execute it in such a manner, as that it has subsisted Ages, and appears indissoluble, and yet a like Union should be impracticable for ten or a dozen English colonies.¹⁴

Many Americans admired the Six Nations for their communal spirit and the collective discipline with which they conducted business around the council fire. But for their own union, they chose a different path. The Six Nations, after all, not only lived in tribal communities without the concept or practice of private property or the complex economic institutions of modern trade and commerce; they also relied on the same confederal principle of mutual agreement and consent that the framers saw as the main obstacle to efficient governance.

The American framers were all men of property, and they were faced with a dilemma. On the one hand, they had invoked popular sovereignty as their collective right to break away from Britain. On the other hand, they feared that the common people, empowered by the vote and by the will of the majority, would threaten individual status and wealth. They found the solution in the writings of a French aristocrat who provided them with a formula of political organization that would safeguard individual freedom as well as collective security.

Montesquieu

This aristocrat was Charles de Secondat, Baron de Montesquieu (1689–1755). Half a century before the French Revolution, he, too, had recognized the mounting bourgeois pressure toward representative inclusion in the body politic. In his celebrated and influential book *De l'esprit des lois* (*The Spirit of the Laws*),

14 Cited in Robert W. Venables, "The Founding Fathers: Choosing to Be Romans," in Jose Barreiro (ed.), *Indian Roots of American Democracy* (Ithaca, NY: Akwe:kon Press, 1992), 81. Also see Donald S. Lutz, "The Iroquois Confederation Constitution: An Analysis," *Publius* 28.2 (1998): 99–127.

published in 1748,¹⁵ he combined his conservative instincts of status protection with a liberal spirit of accepting both the inevitability and legitimacy of the new bourgeois political claims. Among the liberal circles of Europe, it became a best-seller and one of the decisive intellectual sources for the eventual development of liberal constitutionalism in the nineteenth century. For the Americans, it became required reading—although it provided scant guidance for their federalist project. Three principles were particularly relevant for the crafters of the American constitution: first, recognition of *intermediate powers* between people and government as necessary for political stability; second, the constitutional *separation of powers* among the branches of government; and third, the organization of a large state as a *federal republic* subdivided into smaller units on the basis of mutual agreement.

The first principle, about the necessity of intermediate powers, was the most conservative one. Montesquieu liked neither absolute monarchies nor democracies. He referred to nobility, clergy, and cities as the traditional carriers of intermediate power in pre-absolutist times, and he pointed out that the nobility was the most “natural” such power, providing “intermediate channels” of administration, law, and order in large empires or states.¹⁶ Without such channels, he insisted, there can only be despotism. But the very idea of intermediate powers also contains an element of thought important to federalism because it recognizes that societies are plurally structured and that this structure needs to be built into the form of governance. In other words, Montesquieu was opposed to the idea of a society composed of uniform citizens without group identities.

The second principle concerns the importance of separating the legislative, executive, and judicial branches of government. Here Montesquieu drew from what he understood to be the British Constitution in which the king had to share power with parliament and the judiciary. He thought that liberty could not exist if legislative power was united with executive power in a single person or body, if the power of judging was not separate from both, and if all three powers were exercised by the same social class, whether it be nobles or people.¹⁷ A monopoly of power would be tyranny, he argued, whereas a separation of powers would create countervailing powers and thereby protect citizens from oppression. Thus he came to formulate what became his most famous contribution to political thought: “So that one cannot abuse power, power must check power. . . .”¹⁸

15 The original English translation, the one used by those Americans who were not reading Montesquieu in the original, is reprinted as *The Spirit of Laws* (Berkeley: University of California Press, 1977).

16 Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws* (Cambridge: Cambridge University Press, 1989), Bk 2, Chapter 4: “On Laws in Their Relation to the Nature of Monarchical Government.”

17 Montesquieu, *The Spirit of the Laws*, Book 11, Chapter 6.

18 Montesquieu, *The Spirit of the Laws*, Book 11, Chapter 4 (*le pouvoir arrête le pouvoir*).

It is easy to see how the Americans seized upon these principles as the inspiration for their constitutional system of **checks and balances**. However, Montesquieu's doctrine of the separation of powers was at best only obliquely related to federalism because it referred to mutual power control among the branches of government at the same level of governance. It offered no solution to the problem of how to construct a viable balance *between* distinct levels of government.

Montesquieu's final principle was the only one concerning federalism. Because large republics succumb to the internal cancer of despotism and small ones fall to external aggression, he argued, several small states should unite in a larger federal republic.¹⁹ Such an arrangement would provide the best of both worlds—the smallness necessary in his view for safeguarding republican liberty, and the largeness necessary for providing internal and external security. Not only would external aggressors face the collective strength of the member states, but so would aggressors internal to any one of the member states. Should sedition or usurpation take hold in one, it could be contained and stamped out by the others. And, finally, should the union prove unable to deliver the intended benefits, it could simply be dissolved and the member states resume their independent existence.

By referring to the same examples of early modern federalism as Althusius—the Netherlands, Germany, and Switzerland—he pointed out that governance must be based on mutual agreement among members regardless of their size and power. In reference to the ancient Lycian confederacy, he even suggested how such equality could be approximated through weighted voting rights in a common council.²⁰ Beyond this, though, and by contrast with Althusius, he did not provide an elaborated theory of federalism.²¹

Montesquieu's main objective was not to explore the universal principles of political organization in a plural society, but to propose a compromise among different classes that would lead to necessary cooperation rather than social polarization. Postulating that such cooperation was more likely to succeed on a small scale than within a large state or empire, he suggested federalism as a means of combining the republican virtues of social balance in small republics with the security and prosperity of large states.

The Federalist Papers

The central challenge the delegates at the Philadelphia Convention had faced was how to surmount the disabilities of the confederal arrangement existing

19 Montesquieu, *The Spirit of the Laws*, Book 9, Chapter 1 (*république fédératif*).

20 Montesquieu, *The Spirit of the Laws*, Book 9, Chapter 3.

21 S. Rufus Davis, *The Federal Principle: A Journey through Time in Quest of a Meaning* (Berkeley: University of California Press, 1978), 70–71.

under the *Articles* without going to the other extreme of creating a dominant central government that would bring about a *de facto* unitary regime. Prevailing wisdom said that the choice was either a confederal arrangement, where sovereignty was retained by the member states, or a unitary arrangement, where sovereignty was abandoned by the member states and delivered over to the new central government. Sovereignty was generally held to be indivisible, and a compromise or middle ground position where sovereignty was divided was seen as “contradictory in theory and untenable in practice.”²² The Convention, however, produced a compromise that rejected this assumption—sharing sovereignty between the two levels of government, each enjoying a direct relationship with the people, neither one subservient to the other.²³ To skeptics this was asking the impossible and could only be unitary government by stealth.²⁴

The exact nature and meaning of the compromise thus immediately became a matter of dispute when the constitutional draft had to be ratified in the individual states. The opposition focused precisely on the attempt to transfer a substantial share of sovereignty to what they referred to as the “general government.” In the more Althusian view of federalism held by the so-called **Anti-Federalists**, this compromise was an unacceptable abandonment of **states’ rights**. John C. Calhoun, the most prominent spokesman of states’ rights and southern discontent, would bring this view to a point half a century later. In almost the same words as Althusius, he argued in 1853 that a state should have the right to veto national legislation when such legislation affected the interests of that state “separately.”²⁵ As is well known, the issue was eventually settled on the field of battle.

For the time being, however, defence of the compromise as a necessary consolidation of national power fell to three prominent members of the camp of so-called **Federalists**, Alexander Hamilton (1757–1804), John Jay (1745–1829), and James Madison (1751–1836), who contributed to the ratification debate in New York with a series of 85 newspaper essays published during the winter months following the Philadelphia Convention. These essays constitute the famous **Federalist Papers**. Primarily written as “propaganda” with the immediate purpose of political persuasion in mind,²⁶ the *Federalist Papers* were a vigorous, and rather canny, defence of the shift to a much more centralized

22 Taylor, “A System without a Precedent,” 175.

23 David Brian Robertson, *The Original Compromise: What the Framers Were Really Thinking* (New York: Oxford University Press, 2013), 168–69.

24 Herbert J. Storing, *The Anti-Federalist: Writings by the Opponents of the Constitution* (Chicago: University of Chicago Press, 2006).

25 See John C. Calhoun, *A Disquisition on Government* (1840; Indianapolis: Bobbs-Merrill, 1953), esp. 20.

26 Jonathan Rodden, *Hamilton’s Paradox: The Promise and Peril of Fiscal Federalism* (Cambridge: Cambridge University Press, 2006), 43.

form of government rather than a celebration of federalism *per se*, about which the authors were decidedly “unenthusiastic.”²⁷ Their significance lies in the way in which they not only elaborate thoroughly on the chosen institutional design but, moreover, advance principled arguments about the virtues of that design.

Particularly important and foundational for the American tradition of modern federalism are those papers about the direct agency or relationship of the new federal government with the citizens of the union; the protection of citizens arising from the double security of horizontal and vertical checks and balances; the construction of a bicameral legislature based on national and federal principles; and the efficacy of safeguarding the constitutional provisions through judicial oversight.

Direct Agency

The Federalists strongly rejected any constitutional design that would have given the states collective superiority over the union. They did so because this had been the crucial weakness of the preceding confederation, which they likened to the “imbecility” and chronic instability of the European confederacies. They did so also, however, for far more principled reasons. As Hamilton wrote in *Federalist* 15, the “great and radical vice in the existing confederation” was that it recognized only states in their “collective capacities” and not the “individual citizens of America.”

Under the *Articles*, as with all other confederacies, only the member states enjoyed a direct relationship with the people. The central government was a mere agent of the states. This meant that although it might have the power to requisition funds from the states, Congress had little means to enforce that requisition, and although it might have the power to legislate in a number of fields, it had little means to enforce those laws either. The new constitution decisively broke those shackles and granted the new general government a direct relationship to the people, both in raising revenue and in passing laws—a genuine existence and potency of its own. It was no longer reliant on the states but was rather part of a new dual system of government, with the two levels enjoying a separate and parallel relationship with the people. As Hamilton argued in *Federalist* 16, a “federal government capable of regulating the common concerns, and preserving the general tranquility, . . . must carry its agency to the persons of the citizens.”

Direct agency was unprecedented and became an unquestioned feature in most federal states subsequently established. It also meant that the federal government had to create a powerful administrative bureaucracy of its own, and this

27 Martin Diamond, “The Federalist’s View of Federalism,” in William A. Schambra (ed.), *As Far as Republican Principles Will Admit: Essays by Martin Diamond* (Washington, DC: AEI Press, 1992), 138.

in turn helps explain the distinction between legislative and administrative forms of federal organization. The direct agency of the federal government meant that it had to implement, administer, and enforce its own laws. By contrast, in federal systems retaining more of an Althusian tradition, such as Germany and the European Union, even though they, too, adopted powers applying to individual citizens directly, implementation and administration were left to the member units.

In their advocacy of a strong central government with immediate powers over individual citizens, the Federalists had to contend with Anti-Federalist charges that such a government would eventually overawe the states. It fell upon Hamilton, the strongest advocate for a powerful union among the Federalists, to counter these charges. After he had already affirmed quite bluntly that the states would continue to exist “for local purposes” and “in perfect subordination to the general authority of the union” in *Federalist* 9, he tried to deflect the charges by declaring in *Federalist* 17 that it was much more likely “for the state governments to encroach upon the national authorities” because theirs were powers “relating to more general interests” and therefore “less apt to come home to the feelings of the people.”

This argument was disingenuous because Hamilton gave as evidence in *Federalist* 17 “the experience of all federal constitutions, with which we are acquainted”—even though he had just dismissed all of these as mere confederacies and “political monsters” in *Federalist* 15. The argument for direct general powers in itself, however, was not. If the federal government was to be responsible for “common defence and general welfare,” it had to have direct access to the means necessary for regulation and enforcement. As the Federalists put it repeatedly, “the means ought to be proportional to the end.”²⁸ The European Union in its current state of endemic financial crisis illustrates the point, as its commitment to monetary union is not backed up by direct regulatory capacities or effective means of enforcement.

Double Security

Overall, the Federalists were much more concerned with **republicanism** than with federalism, and therefore with the rights and liberties of people rather than those of states. Republicanism was a concept widely used at the time by all those, in Europe as well as in America, who were opposed to monarchical rule but fearful of “democracy.” It generally meant elective representative government. The problem with popular rule, though, was its potential radicalism. Therefore, if it were to be made acceptable, it had to be tamed.

The general approach was as conservative as Montesquieu’s. There had to be a strong central government for the union, but it had to be constructed in such a

²⁸ Hamilton, *Federalist* 23.

way as to prevent the majority from assuming unchecked power over individual property rights. The main source of political conflict is the tendency toward “faction” arising from the unequal distribution of property, Madison wrote in *Federalist* 10, and he declared that the ultimate purpose of government would be to “secure the public good and private rights against the danger of such faction.”

Federalism would do just that, Madison pronounced in *Federalist* 51, because it would make possible an “extended republic” where “society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.” In a large union, in other words, there would be a greater fragmentation of interests and hence less of a danger of majoritarian tyranny. An “extended republic” was thus the primary solution to the problem of popular rule.²⁹ Following English philosopher David Hume, Madison adopted exactly the opposite view to Montesquieu’s: democracy actually functions better in a larger republic than a smaller one.³⁰ However, an extended republic with a single government was too impractical in that period of poor transportation and communications, so it would have to be an extended republic with local self-government. Federalism was therefore the way to achieve an extended republic; it was a means to the end.³¹

But how would such a large union itself be a republic? Here the Federalists modified Montesquieu’s idea of a federal republic in a significant way. Montesquieu had suggested a union of small republics in a large state mainly for external security reasons. Yet while liberty would be secured by separating legislative, executive, and judicial powers *within* these small republics, he had given no indication why and how the people would be protected from the powers of that large state—which he pretty much assumed would be monarchical. In *Federalist* 51 Madison cleverly sought to assuage those who feared an oppressive national government by assuring them that federalism would create a **compound republic** in which liberty was protected by a “double security”—a **vertical division of powers** between the two levels of government, and a **horizontal separation of powers** within each level:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different

29 George W. Carey, *The Federalist: Design for a Constitutional Republic* (Urbana: University of Illinois Press, 1989), 23.

30 David Hume, “The Idea of a Perfect Commonwealth” (1752).

31 Taylor, “A System without a Precedent,” 177.

governments will control each other, at the same time that each will be controlled by itself.

It is this system of multiple checks and balances that became the hallmark of American republican federalism. In the first instance, federalism would help defuse the dangers of a tyranny of the majority simply by making an extended republic possible. But it would also provide a protective mechanism in itself through the potential counterweight effect of one level of government against another. By focusing on the need for stronger central power, and repeatedly emphasizing the dangers arising from local democratic self-government, the Federalists broke with the older tradition's conception of federalism as a way to maintain the autonomy of smaller and social communities.

Compound Majoritarianism

The break with tradition also manifested itself in the way in which the Federalists saw and interpreted the new bicameral legislature. As we will explore more fully in Chapter 8, this legislature resulted from the great compromise between the large states, which wanted proportional representation, and the small states demanding equal representation. The outcome was a House of Representatives, which was elected proportionally by the American people, and a Senate, in which two senators would be appointed from each state legislature regardless of the state's population.

The Federalists had to defend this compromise against accusations that the Convention had merely adhered to the "republican form" but abandoned the "federal form" understood as a "confederacy of sovereign states." They did so by redefining the compromise in an entirely new way, as a combination of "national" and "federal" principles. As Madison put it in *Federalist* 39, the House was "national" because it derived its powers "from the people," and the Senate was "federal" because it derived its powers "from the states." This was novel, because a territorially defined bicameral legislature had not existed before. It was also unprecedented because it redefined federalism itself.

In the older confederal tradition again, federalism—if not in name then at least in practice—had meant council governance whereby the members of a union directly participated in, and determined, common decisions. According to the Federalists' vision, as Madison argued in *Federalist* 62, it now merely meant that the states were given an equal vote in a bicameral system of **compound majoritarianism** requiring "the concurrence, first, of a majority of the people, and then, of a majority of the states."³² The Federalists did not like this

32 See Elazar, *Exploring Federalism*, 19; and Thomas O. Hueglin, "Comparing Federalisms: Variations or Distinct Models?," in Arthur Benz and Jörg Broschek (eds.), *Federal Dynamics: Continuity, Change, and the Varieties of Federalism* (Oxford: Oxford University Press, 2013), 41–43.

compromise, but they grudgingly acknowledged that the principle of shared sovereignty would be constitutionally recognized and preserved in this way.

Judicial Efficacy

The final and possibly most far-reaching innovation that the Federalists had to defend and comment on was the stipulation, in Article III of the constitution, that “the judicial Power of the United States shall be vested in one supreme Court,” and that this judicial power “shall extend to all Cases, in Law and Equity, arising under this Constitution.” Controversy arose most particularly over the question of whether this would establish “a superiority of the judiciary to the legislative power.” In *Federalist* 78, Hamilton tried to counter such fears with a rather sophistic argument: since both legislative power and constitution originate from the people, the “the power of the people is superior to both”; judges would simply be guided by the “fundamental laws” of the constitution in their adjudication of legislative Acts, “which are not fundamental.” This was sophistic because the judges of the Supreme Court, independent and appointed for life, still would have the last word. It had to be so, Hamilton argued, because “complete independence” is “peculiarly essential in a limited constitution,” which “contains certain specified exceptions to the legislative authority.” The duty of the Court “must be to declare all acts contrary to the manifest tenor of the constitution void.”

Hamilton’s argumentation went well beyond Montesquieu’s separation of judicial power from the two other powers of government. Montesquieu had simply argued that liberty required that those making and enforcing the law should not also be in a position of adjudicating adherence to it. By making the Court watch over the constitutionality of the law itself, and thus, by implication, also give interpretative meaning to the “tenor” of the constitution, the Federalists opened the door to **judicial review**, which the constitutional draft itself had not explicitly mentioned at all. This, Hamilton explained, was necessary not only “as a check upon the legislative body” in passing “unjust and partial laws,” but also in order to give “efficacy to constitutional provisions regarding the distribution of powers between the two levels of government: Controversies between the nation and its members or citizens, can only be properly referred to the national tribunals.”

The Federalists tried to downplay the immense power and importance resulting from the kind of judicial efficacy they attributed to the Court. Following Montesquieu, Hamilton argued in *Federalist* 78 that the judiciary would remain the “weakest of the three departments of power” because it did not possess powers of “either the sword or the purse” and therefore had “neither FORCE nor WILL, but merely judgment.” Whether the Federalists actually believed this or not, subsequent developments quickly proved them wrong by putting American federalism onto a trajectory of **judicial federalism**—as we will see in Chapter 11. Indeed, given the often-dysfunctional blockages resulting from

the American tradition of multiple checks and balances in recent years, it is not much of an exaggeration to say that the most important decisions presidents may be able to make during their tenure are appointments to the bench of America's highest court.

Socioeconomic Federalism in the Nineteenth Century and Beyond

Essentially, the history of federalist thought can be defined in terms of these two traditions: the European tradition of treaty federalism, with its emphasis on agreement among autonomous communities and a fluid regime of power-sharing based on considerations of subsidiarity; and the American tradition of constitutional federalism, with its emphasis on rights protection based on judicial interpretation.³³ Because of the tumultuous social transformations during the nineteenth century, however, at least some variations on these models deserve mentioning.

The French Revolution

Only a couple of years after the Americans drafted their constitutional document, the French Revolution changed the European world of politics in a much more dramatic way. Although ending in abject failure—a regime of terror, Bonapartism, and the eventual restoration of the French monarchy—its declaration of universal human rights in the name of liberty, equality, and brotherhood galvanized all European societies in an unprecedented and irrevocable way.

By sweeping away the regional fiefdoms of the old regime, the French Revolution's contribution to the history of political institutions was the centralized unitary nation-state. In the wake of industrial modernization and the formation of large working classes, socialists in particular placed their hopes for an egalitarian political order in a new era of democratic centralism. Federalism was rejected as reactionary. Certainly, Bismarck's German federation appeared to Karl Marx as an attempt at preserving the power of territorial dynastic princes against the tidal wave of democratization.³⁴

Pierre-Joseph Proudhon

There were only a few socialist thinkers who seized upon the idea of federalism as an opportunity for political and economic equality. One of them was Pierre-Joseph Proudhon (1809–65), who rejected the centralism inherent in both the French and the Industrial revolutions and argued for a kind of federal socialism in which agricultural and industrial workers would become self-governing producers in a radically decentralized social order. After Althusius, for whom the idea of

³³ See Hueglin, "Comparing Federalisms," 44.

³⁴ Karl Marx, "Moralizing Criticism and Critical Morality," in Karl Marx and Friedrich Engels, *Collected Works*, Vol. 6 (London: Lawrence and Wishart, 1976).

the separation of state and market simply did not exist at the very beginning of the modern age, Proudhon was the first theorist of federalism who explicitly included the organization of economic production in his conception of federalism.³⁵

Proudhon rejected all concentrated power, whether it be in the hands of a prince, a liberal bourgeoisie, or a revolutionary proletariat. Instead, he suggested a form of political organization based on pluralized self-governance among local and regional constituencies. Such a federal structure would be incomplete and futile, however, if it did not extend to socioeconomic organization as well. Otherwise, the centralism inherent in modern capitalism would triumph over decentralized political powers. Parallel to political federation, Proudhon therefore insisted on an agro-industrial federation constituted from autonomous enterprises and the associations of the producers of goods and services.

Like Althusius, Proudhon looked to an ascending order of indirect council governance. Municipal or local councils would elect representatives for the regional councils, which in turn would elect representatives for the national council. Members of these territorially organized councils were to be representatives of the associations of producers of goods and services, as well as of consumer associations. The state, as embodied by a national council at the top of this ascending pyramid, would retain only two essential functions: foreign policy and national economic planning. In the latter function, the state would provide producers with necessary information about economic needs and trends. Well into the twentieth century, indicative planning was a central motif of French economic and industrial policy. The government provided macroeconomic data that could help producers to make the right decisions in their own best interest.

Like Montesquieu, Proudhon did not develop an elaborate theory of federalism, but he added an important socioeconomic dimension to federalist thought. He foresaw the enormous concentration of power in modern capitalism, and, like other socialists, he believed that economic power would come to dominate the political system. He therefore insisted that it was the economic system of production itself that had to be federalized. This was not an idea popular with capitalists. Neither was it popular with most socialists, who harboured dreams about economic equality planned and dispensed by a powerful central state. It was taken up, however, by a number of schools of thought and social movements that rejected both capitalism and socialism as two sides of the same coin—a concentration of power at the expense of democratic citizenship.

Integral Federalism

In the 1930s, an international group of intellectuals gathered in Paris around Alexandre Marc, a Russian emigrant socialist philosopher and publicist who

35 Pierre-Joseph Proudhon, *The Principle of Federation* (Toronto: University of Toronto Press, 1973).

followed Proudhon rather than Marx. In what they would later call a philosophy of **integral federalism**, these intellectuals wanted to provide Europe with a new political order based neither on bourgeois nationalism nor on socialist internationalism. Because they fully expected that the unfinished business of the First World War would soon lead to another war, they called for a “real” or “integral” system of European federalism that would have to include political and economic integration.³⁶

Faithful to their Proudhonian roots, these integral federalists based their vision on three closely related principles. First, they argued that individual freedom could exist only if it was supported by a structure of self-governing communities tied together by common interests and identities. They called this “personalism,” a view of human nature as embedded in plural relationships and therefore at odds with radical individual liberalism. Second, they held that the only legitimate role of the state was to serve these community interests. And third, they proposed a mixed economy in which basic consumer needs would be safeguarded through cooperative public planning, while additional consumer interests could be satisfied by a free market. As Proudhon had suggested, the entire system would be based primarily on self-organization and federated coordination among producer and consumer groups. The state would play only an auxiliary role of providing information and guidance.

The utopian idealism of these integral federalists stood little chance of being heard during the interwar years. The Second World War confirmed their fears but entirely destroyed their dreams. Both individual and group liberty became casualties of nationalism and state totalitarianism. While the group dispersed, several of its members remained active in various European resistance movements against the Nazi regime, and even during these darkest hours of European history they continued to campaign for reconciliation between France and Germany in a postwar European federal order.

European Federalism

After the war, integral federalism did provide some inspiration for the architects of European integration. A peaceful European political order, it was generally assumed, would naturally follow from economic integration. In order to prevent a new surge in economic nationalism, however, committed federalists such as Denis de Rougemont, a former member of the integral federalism group, argued that the principal building blocks of a European federal order should be the European regions and not the nation-states.³⁷

36 See Lutz Roemheld, *Integral Federalism: A Model for Europe* (New York: Peter Lang, 1990).

37 See Étienne Tassin, “Europe: A Political Community?,” in Chantal Mouffe (ed.), *Dimensions of Radical Democracy: Pluralism, Citizenship, Community* (London: Verso, 1992), 169–92.

It soon became clear that nation-states would remain the unavoidable building blocks of the new Europe. Moreover, economic integration would follow the model of individualized market relations and not the kind of socioeconomic federalism among producer and consumer groups that the integral federalists had championed. Yet, at least in principle, the evolving process of European integration did incorporate a number of ideas owed to what can be called a European tradition of socioeconomic federalism. In 1957, an Economic and Social Committee, which included representatives from producer and consumer organizations, was added to the institutional set-up of the European Community. Although not vested with voting rights, it must be consulted before decisions in most areas of economic policy can be taken.

In 1993, when the Maastricht Treaty transformed the European Community into the European Union, a similarly consultative Committee of the Regions was established. At the same time, funding for regional development and cohesion was increased dramatically, and the regions became more directly involved in the process of designing their own development programs. The insertion of the principle of subsidiarity into the Treaty acknowledged more generally that decisions should be taken at the lowest possible level of governance. One of the principal driving forces behind the Maastricht Treaty was Jacques Delors, a French socialist who served as president of the European Commission from 1985 to 1995. He was well acquainted and associated with the personalist circles of the integral federalism school. His research team also discovered and acknowledged the Althusian roots of subsidiarity.

It is too early for a precise positioning of the EU in the history of federalist traditions. It would appear, however, that federalist thought and practice have come full circle. Althusius had proposed federalism as a regime of confederal agreements among autonomous communities or consociations. For the Americans, federalism became a tool for state- and nation-building, with much more emphasis on the efficiency of central governance. With the EU, the focus has shifted back to a more confederal perspective. The member states remain the principal actors, and changes to the scope and dimension of EU governance can only be made by means of treaty changes requiring unanimous approval.

As we will see in the next chapter, the formation of federal states in practice was far more driven by the *realpolitik* of conflicting economic, cultural, and territorial interests than by lofty philosophical principles of mutual sharing and social fairness. But the federalist traditions discussed in this chapter nevertheless provided important normative guidance in a more general sense. Moreover, different traditions also led to different outcomes.

The Formation of Federal States

WHY DID SOME OF THE MODERN WORLD'S nation-states take a federal form and others not? In the previous chapter, we explored the ideas of social philosophers and political theorists. Their enthusiasm and endorsement of federalism can be explained quite easily. Generally speaking, they were concerned with the mismatch between the complexities and threats of real social life and the simplicity of the modern state construction imposed upon it. They also had more personal motivations. Althusius worried about the autonomy and survival of Protestant minorities under a regime of imposed state religions. Montesquieu's advocacy of mutual checks and balances arose out of his fear that aristocratic class privileges would be wiped out by bourgeois majorities. And Proudhon, finally, stemming from a humble background of craftsmen and tavern-keepers, saw himself as a defender of their interests against the overwhelming forces of industrial capitalism.

However compelling these ideas and motivations may appear, they do not explain why federalism became a practical option for the organization of modern states. With the exception of Montesquieu's influence on American thinking, these theorists did not have a lasting impact on politics in theory and practice. In this chapter, we want to explain why federal solutions to political problems were applied in practice.

In attempting to do so, we first note that while the world's libraries are full of books on modern state formation, the rise of popular sovereignty, and parliamentary democracy, federalism has by comparison been treated with neglect. Indeed, it is no exaggeration to say that a general theory of federal state formation does not exist. Instead, we find country-specific explanations and a few systematic comparisons of institutional arrangements. We take for granted a universal drive toward democratic elections and responsible government, but we have no general explanation as to why some countries, ranging from Germany and Australia to India and Brazil, have chosen a federal form of statehood, or why previously unitary states such as Spain or even the UK have been thrust upon a trajectory of federalization more recently.

In this chapter, we begin by considering a number of factors accounting for the adoption of federal rather than unitary statehood. With the help of these, we then turn to the country-specific design of basic models. We finally discuss some variations on these models in the rest of the world.

The Federal Compromise: Explanatory Perspectives

Modern states came about, in the words of a prominent historian, when "small groups of power-hungry men fought off numerous rivals and great popular

resistance in the pursuit of their own ends, and inadvertently promoted the formation of national states and wide-spread popular involvement in them.”¹ The easiest answer to our question, then, is this: when no single group of power-hungry men was strong enough to defeat all others, a federalist compromise became necessary for the mutual benefit of stability. However, this leads to further questions: under what historical and contextual circumstances was the hegemonic victory of one party improbable, and what compelled rival parties to seek some form of federal union as a consequence? For Wheare, federal systems arise only when a number of “prerequisites” exist, including a combination of shared identity and shared interests alongside political fragmentation.² More specifically, we can say that the formation of unitary nation-states was much less likely in cases where

- late state formation was bringing together already defined communities,
- colonial impositions created pluri-national territories and regional settler societies, or
- interests were deeply divided between modernizers and traditionalists.

Meanwhile, disparate units were driven to form some kind of a union by a mixture of pressures, notable among them being

- external threat, which provided an incentive for common defence and action among otherwise independent entities, and
- economic advantages, which provided an incentive for a larger and more open market.

Late State Formation

Federations generally came into existence relatively late in the game of modern state-building. Historical reasons for this lateness help to explain why state-building efforts resulted in a federal rather than a unitary system.

In the Old World, Switzerland and Germany remained loose confederacies despite all the modern state-building going on around them. Before the modern age of accelerated transportation and communication, the Swiss Alpine valleys were almost as separated from one another, and from the rest of Europe, as were the

¹ Charles Tilly, “Western State-Making and Political Transformation,” in Charles Tilly (ed.), *The Formation of National States in Western Europe* (Princeton, NJ: Princeton University Press, 1975), 635.

² K.C. Wheare, *Federal Government*, 4th ed. (Oxford: Oxford University Press, 1963), 35–40.

settlements in the New World. Meanwhile, the German princes jealously maintained their territorial sovereignty against the fading appeal and power of the Holy Roman Empire. When, in the nineteenth century, the inevitable modernization came, it strengthened particular existing societies. Hence a federal solution to the challenges of modernization and state-building was the obvious answer.

Late state formation was also a factor in the New World. The settler colonies of the Americas and Australia were new societies that did not exist when modern state formation began in Europe. Federalism was almost unavoidable, therefore, because these new societies were settled piecemeal, creating separate societies, economies, and colonial units of responsible self-government across a vast territorial expanse. While these separate societies eventually agreed on the need for some form of union, they were quite unwilling to abandon their previous achievements and status altogether.

Typically, this federal solution was fraught with ambiguity. In earlier cases of state formation, sovereignty passed from the older and smaller territories to the larger and newer one. In the later cases of negotiated federal state formation, the contentious issue of regional versus national sovereignty was settled in a calculated compromise over divided powers. Inevitably, what looked like a tidy constitutional solution on paper proved to be a messy arena for competing legal interpretations in practice.

Colonial Impositions

The federalist compromise among the British settler colonies of the New World was a compromise among the settler population only. The Indigenous populations, to the extent that they still played a numerical role, were neither consulted nor taken into consideration. There were, however, cases of colonial conquest elsewhere, in Asia and in Africa, where diverse tribal societies within arbitrary colonial boundaries came under the administrative rule of European elites. When these conquest (rather than settler) colonies eventually gained independence, some form of federalism was the only option for political accommodation within the inherited territory. Only a few of these newly created countries—notably India—managed to develop into relatively stable and democratic federal republics.

Nor were artificial boundaries the only imposition upon conquered territories. Government style was another. British colonial administrations, for instance, left a legacy of responsible self-government. In the Hispanic Americas, on the other hand, authoritarianism, Catholicism, and bureaucratic centralism generated regimes of clientelist provincial administrations dominated by powerful regional settler elites. After independence, federal governments were set up as arenas for competitive struggles among these regional elites who were more interested in the continued exploitation of the land under their control than in national modernization schemes. The instability of such oligarchic federations not only typically retarded modernization but also and almost regularly resulted in military

dictatorships imposing national modernization programs from above. Instead of a true federalist compromise, the political development of these countries oscillated between extreme regionalism and authoritarian centralism.

Modernizers and Traditionalists

Modern state-building went hand in hand with economic modernization, economy-of-scale production, and standardized means of communication, transportation, and administration, as well as secure and free access to international trade. The efforts of economic modernizers, however, routinely met with the resistance of traditionalists who wanted to protect their regional and class privileges as well as, in some cases, cultural identities.

Unitary states emerged where traditionalist resistance was successfully submerged. In the English Civil War of 1642–51, the new propertied classes fought against old privileges and monopolies in trade and commerce. A clear regional division of interests can be discerned as well. While support for economic modernization and parliamentary control came from the economically more advanced south and east, economically backward regions in the north and west supported the king.³ In due course, the monarchy became constitutionally constrained, and parliament emerged as the absolute sovereign. When the century began, England was still a traditional society of yeomen. When it ended, it had become the first modern commercial empire. “The wealth of the nation,” wrote Jonathan Swift, “that used to be reckoned by the value of land, is now computed by the rise and fall of stocks.”⁴ England had become the first instance of modern and unitary state formation.

One or two centuries later, economic modernizers in the British settler colonies as well as in the fragmented territories of Switzerland and Germany also pressed for economic modernization, and their efforts were again met with resistance by traditionalists opposed to the standardization of socioeconomic and cultural life. Yet traditional societies and their governing elites had become too strong by that point, and their vested interests too deeply entrenched in regional politics and culture, so a unilateral victory of one camp over the other was no longer an option. Even where military conflict ensued, as in the American Civil War of 1861–65, or in the brief Swiss war of secession in 1847, the outcome retained a federalist compromise.

This compromise typically gave the modernizers what they wanted: centralized powers over trade and commerce as the essential tools to build national markets. But it also assuaged traditionalists with local control over social and cultural matters.

³ Christopher Hill, *The Century of Revolution 1603–1714* (New York: Norton, 1982), 103

⁴ Quoted in Hill, *The Century of Revolution*, 234

External Threat

The most parsimonious theory of the formation of federal systems is William Riker's theory of external compulsion:

In every successfully formed federalism it must be the case that a significant external or internal threat or a significant opportunity for aggression is present, where the threat can be forestalled and the aggression carried out only with a bigger government. This is what brings union at all and is the main feature, the prospective gain, in both giving and accepting the bargain.⁵

Supporting evidence is not hard to find: both the early Dutch and the original Helvetic or Swiss confederations were a direct response to strategic threat; they were, indeed, "security confederations." The Swiss confederation gradually took shape from the thirteenth century onward when the ruling families controlling the Swiss Alpine transit passes concluded a compact for the mutual defence of their interests against outside forces.⁶ Nineteenth-century German state-building was closely associated with European power politics and the attempt to establish strategic dominance. The original US confederation was forged out of the War of Independence and within the context of ongoing trade embargos and diplomatic isolation. In Canada and Mexico, union was in no small part occasioned by the threat or reality of American expansionism.

Economic Welfare

Parsimony, however, is not the only criterion of good theory, and Riker's rather "commonplace" observation was clearly an oversimplification.⁷ German political union of the nineteenth century was preceded by important steps toward economic integration, the *Zollverein* or customs union.⁸ The drive toward larger markets by modern capitalism, in other words, constitutes a strong incentive for federal union in its own right. Britain's Australasian colonies were not subjected to any significant threat at all—though some warned that Germany's colonialist ventures in the Pacific were a harbinger of danger. And the EU is the epitome of federal integration occurring out of a desire for economic rather than military

5 William H. Riker, "Federalism," in Fred I. Greenstein and Nelson W. Polsby (eds.), *Handbook of Political Science, Volume 5: Governmental Institutions and Processes* (Reading, MA: Addison-Wesley, 1975), 116.

6 Frederick K. Lister, *The Later Security Confederations: The American, "New" Swiss, and German Unions* (Westport, CT: Greenwood Press, 2001).

7 S. Rufus Davis, *The Federal Principle: A Journey through Time in Quest of a Meaning* (Berkeley: University of California Press, 1978), 137.

8 Walter Mattli, *The Logic of Regional Integration: Europe and Beyond* (Cambridge: Cambridge University Press, 1999).

advantage. Any theory of federal formation must account for these developments. Even Riker acknowledged in the end that the relative importance of the two factors might be reversing in the modern world:

Today the question is: can this once secondary motive for federation become the primary motive that generates a federal Europe? In a world where trade is vastly more important than it was a generation ago, perhaps the answer is affirmative.⁹

With these macro-historical and theoretical approaches in mind, we can now look at how the basic models of federalism were designed. As we shall see, caution is required in applying these theoretical criteria too narrowly or too literally. They are only broad guidelines helping to understand the general thrust of federal state formation. We begin with the United States, where modern federalism first took shape.

The United States and the Invention of Modern Federalism

The American story begins with the existence of 13 largely self-governing British colonies in North America, colonies that shared a broad sense of identity and set of political institutions, as well as growing frustration with imperial control from Britain. They were also divided by a number of differences, by far the most important of which was slavery—which had a pervasive influence on the drafting of the constitution and which of course would be fundamental to the dynamics of American federalism for a long time to come.¹⁰ Between the launching of the independence movement in 1775 and the ratification of the final constitution in 1789, the Americans worked their way toward a viable federal arrangement. It was a process that involved both very practical trial and error and, as we already saw in the preceding chapter, very theoretical reasoning about the principles of government.

The process of union began with the Continental Congress, through which the otherwise separate colonies conducted the War of Independence (1775–83). During that war, this initial union was formalized by the establishment of a loose confederal arrangement under the first US constitution, *The Articles of Confederation and Perpetual Union*. Once the war was over, however, the practical inadequacies of the system of government created by the *Articles* quickly led to a growing desire for a more robust and effective form. Finally, at the Philadelphia Convention of

9 William H. Riker, "European Federalism: The Lessons of Past Experience," in Joachim Jens Hesse and Vincent Wright (eds.), *Federalizing Europe? The Costs, Benefits, and Preconditions of Federal Political Systems* (Oxford: Oxford University Press, 1996), 23.

10 See George William Van Cleve, *A Slaveholders' Union: Slavery, Politics, and the Constitution in the Early American Republic* (Chicago: University of Chicago Press, 2010).

1787, the delegates arrived at a constitutional compromise that would become the classical model and template for the modern federal state.

Initial Union

Agreed upon by the Continental Congress in 1777 but only fully ratified in 1781, the first US constitution established for the 13 states a classic confederation—a “league of friendship,” as Article III described it. The very first substantive clause (Article II) in the document asserted unequivocally that

Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.

The sole institution of the new United States government was that of the state delegates meeting “in congress.” There was no chamber representing the people; no president; no judiciary; no administrative structures; no taxing or law-making powers. Congress had a range of powers to make collective decisions; however, each and every one of these decisions had to be ratified by 9 of the 13 states. Congress had no power to raise its own revenue, but instead had to rely on requisitions from the states. By thus having no direct relationship with the people—either in representative terms or in policy and taxation terms—and no autonomous policy power, this newly created central government was without any basis for effective governance.¹¹ It suffered from the fatal collective-action or “free rider” problem that each state contributed its share of resources only to the extent that they calculated was proportional to the direct benefit they would receive. Once the immediate external threat had been dealt with, they contributed very little at all.¹² These manifest limitations were exacerbated by the unanimity requirement, which made it virtually impossible to address these problems by amending the *Articles*.¹³ As the Federalists were keen to point out, the first US constitution epitomized the dysfunctional compromises of confederalism.

Closer Union

There were many reasons, therefore, why the Americans wanted to enter into a closer federal union. Lacking a firm commitment to fiscal contributions from the states, Congress was unable to regulate the domestic economy. External difficulties

¹¹ Lister, *The Later Security Confederations*, 19–97.

¹² Ben Baack, “Forging a Nation State: The Continental Congress and the Financing of the War of American Independence,” *Economic History Review* 54.4 (2001): 639–56; Keith L. Dougherty, *Collective Action under the Articles of Confederation* (Cambridge: Cambridge University Press, 2001).

¹³ Baack, “Forging a Nation State.”

were very much on the minds of the delegates assembling in Philadelphia. The Confederation was threatened by trade embargos and diplomatic isolation, and America needed a more effective means of advancing its strategic interests.¹⁴ However, the war was over, and the United States had been doubly victorious: the British threat had been not only repulsed but entirely removed. What appeared prominently, then, in the concerns animating the founders were fears of *internal* threats and disabilities, particularly relating to socioeconomic conflict. The most important reason, perhaps, was the deep concern of America's property-holding elites with the dangerous populism of the state governments.¹⁵

These were all reasons calling for a strong central government. The "excesses of democracy" would best be curtailed by having an overarching authority that could quarantine disorders at the local level and bring superior authority to bear. Yet a unitary state modelled after Britain, Spain, or France was out of the question. The differences among the states were too great, and there was no ruling elite or majority faction strong enough to impose its will on all others. The only option was some kind of enhanced federalism, one in which stability would result not from republican virtue in small republics, as Montesquieu had suggested, but from their incorporation into one large republic.

Multiple Compromises

The delegates at the Philadelphia Convention all agreed that union governance had to be strengthened, but that was about as far as agreement went. The "Virginia Plan"—spearheaded by Virginia delegate James Madison—intended to create a national republic, the powers of which would be unambiguously superior to those of the states, ultimately perhaps reducing them to the status of dependent administrative units. In response, the "New Jersey Plan" sought to retain a confederal arrangement while making some concessions to the need for a more "energetic" central government.

Out of this emerged a series of compromises through which a novel form of government was created, as the modernizers wanted, without abolishing or even seriously touching some of the old ways the traditionalists wanted to retain. It carried forward a number of features from the *Articles* but fundamentally broke with confederalism.¹⁶ The first compromise was about representation

14 Max M. Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (New York: Oxford University Press, 2003).

15 Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789–1815* (New York: Oxford University Press, 2009), 16–19; also see Robert A. McGuire, *To Form a More Perfect Union: A New Economic Interpretation of the United States Constitution* (New York: Oxford University Press, 2003).

16 Donald S. Lutz, "The Articles of Confederation as the Background to the Federal Republic," *Publius* 20.1 (1990): 55–70.

in the Congress: would it be based on the old confederal principle of equality or on proportionality according to population? As we will discuss in Chapter 8, the "Connecticut Compromise" squared this circle by means of bicameralism. A second compromise had to do with the retention, for the time being, of slavery, that "peculiar institution," as it was euphemistically referred to, on which the economy and social system of the South depended. A third and related compromise, as we will discuss in Chapter 6, pertained to policy-making and the division of powers, giving to the economic modernizers the national tools of trade and commerce regulation while leaving social policy and education with the traditionalists.

The final package transformed the union from something referred to in the plural—"The United States *are* . . ."—to something that could be referred to in the singular, a nation-state—"The United States *is* . . ." However, it left a number of unanswered questions that were the subject of great issue in the ratification debates between so-called Federalists and so-called Anti-Federalists and that remained unresolved until at least the end of the Civil War.

The Bill of Rights

As we discussed in the previous chapter, the Federalists placed their faith in the separation of powers between the three branches of government and the resulting system of multiple checks and balances as the chief mechanism securing individual rights. Moreover, since they saw these rights endangered by democratic majorities at the state level, the constitutional draft also contained, in Article VI, a **supremacy clause** for national legislation. The Anti-Federalists argued in response that since there could then be only one sovereign legislature, the powers of the union would eventually annihilate states' rights.¹⁷ To ensure ratification, therefore, the Federalists had to promise that once the government was established, initiative would be taken to amend the constitution.

The result was the first ten amendments of 1791, generally known as the Bill of Rights. Under the leadership of Madison in the House of Representatives, these amendments were overwhelmingly concerned with protecting the classic legal rights of individuals from Congress. The Tenth Amendment, meanwhile, acknowledged the rights of the states. It formally acknowledged the residual powers (see Chapter 6) whereby the states would retain all powers not expressly granted to Congress. Although this was transferred from the decidedly confederal constitution that the Americans were replacing, any hopes that the Tenth Amendment would carry over that spirit have proven illusory. As we will discuss in Chapter 11, judicial interpretation has established rather a different balance

17 Among the vast literature, see Herbert J. Storing, *What the Anti-Federalists Were For: The Political Thought of the Opponents of the Constitution* (Chicago: University of Chicago Press, 1981); David J. Siemers, *Ratifying the Republic: Antifederalists and Federalists in Constitutional Time* (Stanford, CA: Stanford University Press, 2002).

between national supremacy and states' rights—in no small measure because the protection afforded by the first nine amendments was eventually extended to cover actions by the states as well as by Congress.

Reluctant Confederation in Canada

In 1867, three of the remaining British North American colonies—the Province of Canada, New Brunswick, and Nova Scotia—agreed to a federal union. The resulting Dominion of Canada comprised just four “provinces,” as the constituent units were called: Québec, Ontario, New Brunswick, and Nova Scotia. Subsequently, neighbouring colonies joined (the last being Newfoundland in 1949); new western provinces were created, and self-governing territories added (the most recent being the far-north territory of Nunavut in 1999).

It is no accident that Canadian federation occurred in 1867, immediately following the conclusion of American federalism's cataclysmic moment, the Civil War fought between the slave states and the free states in the early 1860s. The Canadian founders were skeptical about federalism and saw the raging war south of the border as a clear illustration of its weaknesses. In fact, paradoxically, “no understanding of Confederation is possible unless it be recognized that its founders, many of its supporters, and as many of its opponents were all animated by a powerful antipathy to the whole federal principle.”¹⁸ But all previous attempts at some form of common governance for the two provinces of British North America—French Lower Canada and English Upper Canada—had proven unstable, and some form of federal union became inevitable. And agreement existed that a union had to be forged for all the reasons already explored in the American case: external threat, the desire for a large national market economy, and, most importantly in this case, the accommodation of social and cultural differences.

Pre-Confederation and the French

It is important to bear in mind that Canada was not just a British settler colony; it was also a conquest colony, a colony imposed on an already existing colony. In 1759, the British had defeated the French on the Plains of Abraham outside Québec City, and what had until then been *Nouvelle France* was ceded to Britain in 1763. From then on, Canadian history unfolded as a history of bicultural tension and conflict. Prior to Confederation in 1867, this history was marked by a series of British interventions oscillating between accommodation and assimilation of French Canadians.

The *Royal Proclamation* of 1763 first provided a representative assembly for the new British colony of Québec and “outlined a policy of assimilation for the

¹⁸ Peter B. Waite, *The Life and Times of Confederation, 1864–1867* (Toronto: University of Toronto Press, 1962), 33.

French" under British law. Anticipating the American Revolution and in the hope of securing French loyalty, the *Quebec Act* of 1774 then conceded maintenance of a "French way of life," including Catholicism, the seigneurial land-holding system, and the recognition of French civil law. After American independence, when large numbers of Loyalists migrated north, the *Constitutional Act* of 1791 divided Quebec into Upper and Lower Canada, each with its own elected assembly, thus "implicitly acknowledging Lower Canada as the homeland of the French Canadians." After the 1837 rebellions in Upper and Lower Canada, which were particularly violent in Lower Canada, and accompanied by demands for "responsible government"—meaning that the British governors and their executive councils be accountable to the assemblies—the *Durham Report* of 1839 "proposed a return to the assimilation strategy of earlier years." Dispatched by the British government to investigate the situation in British North America, Lord Durham (John Lambton, 1792–1840) recommended responsible government be granted, albeit as a majoritarian regime within a reunited single province. His assumption was that "continuous immigration of English-speaking peoples would swamp the French Canadians over time and lead to their assimilation." While the *Act of Union* in 1840 followed one part of Durham's recommendation by creating the United Province of Canada, the establishment of responsible government was delayed until 1848. The overall effect, however, turned out to be the opposite of assimilation. The cultural dualism between the two linguistic groups not only deepened, but it also led to "a practice of double majorities" in the assembly and "other consociational arrangements for the conduct of the business of the Province."¹⁹ Confederation, then, "was driven and drawn by the inability of French and English to live together in the unitary state imposed by the British."²⁰

Confederation

In sharp contrast to the American revolutionary experience, the Canadian process of union was grounded in continued loyalty, not defiance, to the British institutions of parliamentary government. After all, the Canadians had achieved responsible government under the Crown, and the British parliamentary institutions they had inherited were to them institutions of democratic self-expression, not institutions of foreign dominion.

By 1858, the proposal for a larger union was on the table. Strategically and economically, these plans were given a powerful thrust by developments south of

19 David Cameron, "Quebec and the Canadian Federation," in Herman Bakvis and Grace Skogstad (eds.), *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, 3rd ed. (Don Mills, ON: Oxford University Press, 2012), 42–43.

20 John T. Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2002), 4.

the border. The end of the Civil War greatly increased the annexationist threat—in part because the defeat of the South now made it possible for new non-slave states to be added without requiring a balancing addition of slave states, and in part because of the enormous military machine that the US government now had at its disposal. It also led to the abrogation of free-trade relations and the need for the British North American colonies to turn from a north–south axis to an east–west one. Another facet of this external threat was the fact of American expansionism in the West, a threat not only to the small British settlements there, but also to the merchant dreams of a Canadian transcontinental economy. Moreover, both the declining commitment to mercantilism in Britain and the imminent annulment of the reciprocity treaty with the Americans threatened foreign trade security and fostered ideas of a national economy with a resource hinterland joined to a manufacturing heartland.

For francophone supporters of “Confederation,” as it was rather idiosyncratically called (particularly since the design was anything but confederal), the new federal union offered the space for autonomous development of Québec as a linguistic and cultural island. Francophone opponents—the *Rouge* party—challenged this optimism much as the American Anti-Federalists challenged the proposition that federalism could create an effective central government without eclipsing the states.²¹ Yet even though vigorous and thoughtful debates accompanied the negotiation process,²² from the initial Charlottetown and Québec conferences in 1864 to the final London conference of 1866, the people themselves were not consulted. The “Dominion of Canada” came into existence as an act of the British parliament, the *British North America Act (BNA Act)* of 1867.

Merchants and Seigneurs

As in the American case, the federal compromise had to accommodate the interests of both economic modernizers and cultural traditionalists. In essence, anglophone merchants wanted to build a union with a strong central government that would facilitate economic integration and western expansion. Meanwhile, francophone *seigneurs* wanted to preserve the autonomy of their land-based privileges under the tutelage of the Catholic Church.

The resulting ambiguity of the Canadian federalist compromise²³ was not really all that different from the initial constitutional outcome in the United States. Despite the grand rhetoric of “We the People,” the US Constitution did

21 See Robert C. Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: State University of New York Press, 1991).

22 See Janet Ajzenstat, Paul Romney, and William D. Gairdner (eds.), *Canada's Founding Debates* (Toronto: Stoddart, 1999).

23 See Richard Simeon and Ian Robinson, *State, Society, and the Development of Canadian Federalism* (Toronto: University of Toronto Press, 1990), 19–30.

not immediately or automatically succeed in creating one nation-state and one national economic system. As in the Canadian case, the conflictive issue of national sovereignty versus the sovereignty of the constituent units remained unresolved. Only the Civil War almost a century later initiated a long and traumatic process of eventual closure in favour of national sovereignty.

By comparison, Canada would remain a fragile construction of national unity and identity throughout. Initially, the decisive issue putting Canadian federalism on a trajectory of decentralization rather than centralization was the issue of Québec's cultural-linguistic minority status within the federation. The original settlement was essentially understood among the two Canadas, one French and one English, as a federal union treaty whereby sectional equality would overrule majoritarianism.²⁴ When the original union of four gradually expanded to a union of ten, Quebecers increasingly came to fear that the numerical majority of the nine primarily anglophone provinces would eventually undermine notions of their status as a distinct society. But it was nearly a century after Confederation when secularization and modernization during the so-called Quiet Revolution of the 1960s not only propelled Québec to the forefront of social policy innovation in Canada, but at the same time accelerated the decentralist thrust with secessionist threats.²⁵ At roughly the same time, the western provinces added to that thrust with their own quests for greater autonomy, both for the management of the natural resources they owned and for social experimentation more generally.²⁶

The Charter of Rights and Freedoms

The *BNA Act* had by no means created a fully sovereign state. As we shall see later in more detail, the Canadians were granted self-government under the *BNA Act*, but not sovereignty over it. They could neither amend the constitution nor adjudicate its interpretation. Until "patriation" in 1982, when Canadians finally gained the right to make constitutional amendments themselves, some 20 prior amendments to the *BNA Act* still required formal approval of the British government in London.

While the amending formula of 1982 reopened the same old question about Québec's place in Confederation—either as equal partner in a dual compact of sectional equality, or as but one province in a federation of ten—an even more contentious issue was the *Charter of Rights and Freedoms* that came with the 1982 constitutional package. As in the American case, the *BNA Act* did not

24 See Ajzenstat, Romney, and Gairdner (eds.), *Canada's Founding Debates*, 278.

25 See Kenneth McRoberts, *Quebec: Social Change and Political Crisis*, 3rd ed. (Don Mills, ON: Oxford University Press, 1999).

26 See John E. Conway, *The Rise of the New West: The History of a Region in Confederation*, 4th ed. (Toronto: Lorimer, 2014).

contain an explicit provision of individual rights protection. The constitutional entrenchment of such rights by means of the *Charter* was clearly intended by then-prime minister Pierre Elliot Trudeau as a “strategy of employing constitutional ‘counterweights’ to offset the centrifugal forces in Canadian federalism.”²⁷ As the Québec government understood full well, a uniform set of individual rights for all Canadians would impose limits upon its ability to enforce a uniform set of rights for all Quebecers only. Thus the *Constitution Act* of 1982 did not bring closure to the question of national versus subnational sovereignty—supported, as it was, only by the nine anglophone provinces. However, the *Charter* was widely welcomed and accepted by most Canadians, and the secessionist threat in Québec appeared to subside after its narrow defeat in a second referendum in 1995.

Germany from Reich to Republic

In the case of Germany, the story of federal state formation has to be told in three instalments. First came Bismarck’s imperial federation, the Reich of 1871; then, after the interruptions of the Weimar Republic and Hitler’s “Third Reich,” came the Federal Republic of (West) Germany in 1949; finally, after the fall of the Berlin Wall, reunification with the former communist East German state posed new challenges of political and fiscal balance. Despite catastrophic discontinuities, German federalism reveals important underlying continuities between its more autocratic nineteenth-century and its fully democratic postwar twentieth-century versions. The distinguishing features of modern German federalism are legacies of the original imperial federation and late unification. In the words of Nevil Johnson, “In Western Europe Germany stands out as a society which achieved political unification late and on unusual terms.”²⁸

Economic and Political Union

As we noted in Chapter 4, Germany’s federal origins can be traced much further back than the unification of 1871. Under the loose and diverse arrangements of the Holy Roman Empire, German territories practised some type of federalism for 800 years. That tradition carried over into the dynamic period of industrialization and nation-building in the nineteenth century when the Napoleonic conquest of Europe threatened the autonomy of German territories, which at

27 Rainer Knopff and Anthony Sayers, “Canada,” in John Kincaid and Alan G. Tarr (eds.), *Constitutional Origins, Structure, and Change in Federal Countries* (Montreal: McGill-Queen’s University Press, 2005), 111.

28 Nevil Johnson, “Territory and Power: Some Historical Determinants of the Constitutional Structure of the Federal Republic of Germany,” in Charlie Jeffery (ed.), *Recasting German Federalism: The Legacies of Unification* (London: Pinter, 1999), 25.

that point consisted of hundreds of dynastic states, free cities, and many more smaller autonomous territories.

Under the post-Napoleonic restoration of Europe in 1815, the German states—now consolidated into a few dozen units including the two main contending powers, Prussia and Austria—re-established a confederal structure, the *Deutscher Bund*. Within that loose political framework, Prussia initiated a free-trade area, the *Zollverein* or customs union, in 1834 as industrialization in the Rhineland created pressure for larger and more open markets.²⁹ The *Zollverein* unified weights and measures and abolished protective duties limiting trade between the separate German states. Economic integration was seen not only as beneficial in itself, but also as a key strategic advance in laying the basis for eventual political union.³⁰ Within a decade, most German states had joined the *Zollverein*, with the notable exception of Prussia's rival, Austria, while continuing to belong to the larger confederacy: "the *Zollverein* was a confederation within a confederation, a *Bund* within a *Bund*."³¹ In 1866, Germany took a decisive step toward federation with the reassertion of Prussian hegemony. Austria was defeated militarily and excluded from membership in the newly created North German Confederation. The *Zollverein*, meanwhile, was extended further and given its own federal parliament.³² The essential character of the German model was established at this point and carried over into the larger union established following the defeat of France in 1871 and the incorporation of the states of southern Germany, most importantly the kingdom of Bavaria.

The Imperial German Federation, 1871–1918

Few of the German princes particularly desired to unite or form a federal union in 1871. Only Prussia and its chancellor (prime minister) Otto von Bismarck did—but Prussia was by far the dominant force among the German states. There were two main ambitions, strategic and economic: to resurrect German national glory in a second empire, or *Reich*; and to press ahead with a national economy led by the industrializing Prussian Rhineland.

The new imperial constitution was proclaimed in the French palace of Versailles, crowning Prussia's victory over France and symbolizing the strategic

29 A customs union entails the abolition of all tariffs or formal restraints on the exchange of goods between participating jurisdictions and their replacement with a common external tariff. It is the second most minimal form of economic association two or more countries can have after a free trade area—which requires only the abolition of internal customs barriers and allows jurisdictions to retain their own tariffs on external trade.

30 H. W. Koch, *A Constitutional History of Germany in the Nineteenth and Twentieth Centuries* (London: Longman, 1984), 23.

31 Murray Forsyth, *Unions of States: The Theory and Practice of Confederation* (Leicester: Leicester University Press, 1981), 167.

32 The *Zollparlament*; Koch, *Constitutional History of Germany*, 103–4.

impetus behind federal union. The empire was formally constituted as a federation among 25 territorial units: four kingdoms, six grand duchies, four duchies, eight principalities, and three free cities. The border region of Alsace and Lorraine was also appropriated from France as an imperial territory. Notwithstanding the dynastic and strongly autocratic nature of this imperial union, late state formation compelled it to take a federal form.

However, the German case invites us to rethink and modify the logical link between late state formation and federalism. Why, for instance, in Germany but not in Italy? Prussia might have used its superior powers to force a unitary solution but opted for a more light-handed approach. Italy, on the other hand, was going through a process of unification at exactly the same time, but the outcome was a unitary state—even though federalism had been on the minds of political elites for at least a generation and Italy had prominent federalist thinkers such as Carlo Cattaneo. The answer would seem to lie in the degree to which the regions had consolidated successful and legitimate modes of self-government. Given the power and long-established nature of some of the larger German states (Bavaria most prominently), cooperation rather than subjugation may well have been essential to a workable and enduring union.³³ Meanwhile, in Italy, the realities were exactly the opposite. As Wheare put it, while Italy could not federate until the autocracies of Sicily and Naples were abolished, “when this defeat was accomplished, nothing was left. There were no governments with authority rooted in the society they governed.”³⁴ The German territories already possessed the “infrastructural capacity” necessary for modernization, a capacity that was so conspicuously lacking in the Italian territories.³⁵ Italy had indigenous traditions of federal thought and would have benefited greatly from a federal structure,³⁶ but not the effective regional self-government necessary for federalism. Thus federalism must be seen as a consequence of compromise among competing powers in late state formation when conducive constraint and opportunity structures are present.

In the German case, the federalist compromise also was very much one among economic modernizers and cultural traditionalists. The division of powers between the empire and its constituent units, the *Länder*, followed the usual pattern. While Berlin became the new hub of modernization, the *Länder* continued to provide most services that affected people’s everyday lives.³⁷ Indeed, this was so much so that they retained almost all administrative responsibilities: “No centralized governmental and

33 Koch, *Constitutional History of Germany*, 117.

34 Wheare, *Federal Government*, 48.

35 Daniel Ziblatt, *Structuring the State: The Formation of Italy and Germany and the Puzzle of Federalism* (Princeton, NJ: Princeton University Press, 2008).

36 Filippo Sabetti, *The Search for Good Government: Understanding the Paradox of Italian Democracy* (Montreal: McGill-Queen’s University Press, 2000).

37 See Abigail Green, *Fatherlands: State-Building and Nationhood in Nineteenth-Century Germany* (Cambridge: Cambridge University Press, 2001).

administrative structure for the Reich was established."³⁸ By the turn of the century, Germany's overall industrial production was second only to that of the United States. The *Länder* thrived as cultural centres, and kings and princes were for the most part admired and imitated by the anti-democratic bourgeois establishment. While Berlin became a centre of world politics, much of everyday life continued to unfold in a familiar and decentralized fashion.

Bismarck's federal construction of the empire included a directly elected lower house, the *Reichstag* (Imperial Assembly³⁹) and an upper house, the *Bundesrat* (Federal Council), composed of the governing German princes. Voting rights in the crucially important upper house were weighted according to population—not surprisingly since a more confederal equality of votes would leave dominant Prussia heavily outvoted by the minor states. Ultimately, the empire was dominated by Prussia, but Bismarck could count usually on his powers of persuasion and consensus-building. Parallel to the tensions between national modernizers and regional culturalists, there was a general fault line of authority versus majority between the two chambers. In the *Reichstag*, Bismarck had to secure majority support from the people, and in the *Bundesrat* he had to orchestrate consent among dynastic rulers.⁴⁰

The Federal Republic of Germany, 1949–90

West Germany was reconstructed from the ashes of Hitler's "Third Reich" as a democratic federation. And, for the first time, the system was both truly democratic and truly federal. Bismarck's Second Reich had not been particularly democratic, and, given Prussia's hegemony, it was federal in a rather unbalanced way. The Weimar Republic that replaced it was democratic but not particularly federal. The Nazi dictatorship was neither democratic nor federal.

When the federal system was reconstructed in 1949, the Nazis were gone, the princes were long gone, and so was Prussian hegemony. Indeed, Prussia itself was gone—a state that had for 200 years been one of the great powers of Europe was completely dismembered. Parts of the old Prussia were now absorbed into Poland or the Soviet Union; another part had been under Soviet occupation and now formed the heartland of the new East German communist state; and the remaining part, in the Western zone of occupation, was subdivided into several new *Länder*. This artificial redrawing of borders for the new West German federal state has often been criticized as arbitrary and—at least in some instances—lacking historical legitimacy. But it did bring about, for the first time in German history, a pattern of relative territorial equality, with regard to

38 Johnson, "Territory and Power," 27.

39 Traditionally translated, rather unhelpfully, as "Diet."

40 See Gerhard Lehmbruch, "Party and Federation in Germany: A Developmental Dilemma," *Government and Opposition* 13.2 (1978): 151–77.

size as well as population and economic strength; the dismemberment of Prussia was the precondition for a "functioning federal system in Germany."⁴¹

Just because those preconditions for a functioning federalism now existed did not mean that West Germany would necessarily be federal. It would have been feasible to reconstruct liberal democracy on a unitary basis; however, postwar Germany represented a triumph of federalism for at least three significant reasons.

First, and despite the fact that some of the old *Länder* boundaries were redrawn quite arbitrarily after the war, federalism had remained part of Germany's identity and political culture. In fact, if there was one realm of politics where Hitler's totalitarian approach had failed, it was in his attempt at supplanting the age-old colourful plurality of German regional cultures with a bland national culture of brown uniforms. It was only during the formative years of the West German Federal Republic that economic success established a relatively high degree of socioeconomic homogeneity, which in turn made Germany a case of territorial rather than cultural federalism. Second, federalism was explicitly seen by the Western powers as affiliated with and supportive of democracy. Imposition of a federal system under Allied supervision was thus both natural and desirable. By contrast, the reconstruction of East Germany—the German Democratic Republic (GDR)—as a communist dictatorship under Soviet supervision occurred in a unitary fashion. And third, the opportunity structure argument about the formation of Bismarckian federalism also applies to the postwar republic: whatever infrastructural capacity was left after six years of total war resided with the reconstituted *Länder*; the prime ministers of these *Länder* were given the task of creating a federal republic; a new and supposedly interim constitution, the "Basic Law,"⁴² was drafted by representatives elected by the *Länder* parliaments.

As we will discuss in Chapters 6 and 8, the legacy of Germany's long federal history was evident in the distinctive approach taken to both the division of powers along the traditional lines of administrative federalism and the design of modern Germany's second chamber as a council rather than a senate.

Reunification, 1990

The success of Germany's postwar federal system was aided and sustained by the relative homogeneity of the *Länder* and their enormous success in rebuilding the West German economy. When reunification came in 1990, and five

41 Wolf D. Gruner, "Historical Dimensions of German Statehood: From the Old Reich to the New Germany," in Arthur B. Gunlicks (ed.), *German Public Policy and Federalism: Current Debates on Political, Legal and Social Issues* (New York: Berghahn Books, 2003), 25.

42 *Grundgesetz*: this term, rather than *Verfassung* ("constitution"), was chosen to indicate the provisional character of the constitution of West Germany, with final constitutional settlement to await reunification. When reunification came in 1989, however, the East German *Länder* were incorporated under the existing constitution and the name was kept.

rather impoverished East German *Länder* were added to the system, there were fears of destabilization. Although the worst of these fears proved unfounded, the introduction of an unprecedented degree of regional economic inequality placed strains on the system—particularly Germany's arrangements for fiscal equalization (see Chapter 7)—that opened up larger questions about the design and workings of German federalism.

In another way, however, reunification once more underscored the enduring strength and continuity of the German federal tradition. In 1952, the regime in East Berlin had abolished the old *Länder* structure in the name of unitary communist centralism. Almost 40 years later, and doubtlessly carried by mounting public pressure, the faltering regime had in fact already made the decision to reconstitute the pre-communist *Länder* structure before the precipitous events leading to reunification. Re-federalization, in other words, did not come to East Germany exclusively as part of the 1990 reunification package. Although this revival of "*Länderbewußtsein* [*Länder* consciousness] begs for further in-depth historical research," it seems clear that 40 years of unitary communist rule had not been able to extinguish the historical memory of federalism.⁴³ The trials and tribulations of German federalism thus also require rethinking and modifying our initial methodological distinction of territorial and cultural federalism.⁴⁴ A political culture of federalism may sustain itself without deep underlying sociological diversity.

Economic Integration and the EU

Europe's path toward federal union does not fit smoothly into this survey of federal state formation for several reasons. The EU is not a classical federal state, nor does its formation date back to the nineteenth century. The process of European integration is not finished, and the final outcome is by no means clear. Yet the history of its formation may be as important for politics in a globalizing twenty-first century as that of the United States was for the nineteenth and twentieth centuries.⁴⁵ Its formation also can be explained quite well with the theoretical approaches chosen for federal state formation in general.

As we noted in Chapter 4, plans for a European federation had already surfaced in various resistance movements against Nazi occupation during the

43 Gerhard Lehmbrecht, *Parteienwettbewerb im Bundesstaat: Regelsysteme und Spannungslagen im Politischen System der Bundesrepublik Deutschland* (1976; Wiesbaden: Westdeutscher Verlag, 2000), 127–28.

44 As recently affirmed by Jan Erk, *Explaining Federalism: State, Society and Congruence in Austria, Belgium, Canada, Germany and Switzerland* (London: Routledge, 2008).

45 See Daniel J. Elazar, "The United States and the European Union: Models for Their Epochs," in Kalyso Nicolaidis and Robert Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford: Oxford University Press, 2001), 31–53; cf. Christopher K. Ansell and Giuseppe di Palma (eds.), *Restructuring Territoriality: Europe and the United States Compared* (Cambridge: Cambridge University Press, 2004).

Second World War. The idea was to tie the European nation-states, including a postwar democratic Germany, into a peaceful union of political, economic, and social cooperation.⁴⁶ After that war, and with the onset of the Cold War, external threat also played a significant role. Europeans were afraid of being squeezed by the geopolitical and economic interests of the two superpowers.

Initially, at least, some may have harboured dreams of a United States of Europe in analogy to the United States of America. But soon, traditionalist views of nation-state sovereignty reasserted themselves, leaving for Europe only a functional blueprint of economic integration. The modernizers, in other words, were once again interested chiefly in the creation of an integrated market economy while leaving most other policy areas to traditional nation-state governance.⁴⁷ The incremental development of the EU has been first and foremost a story of closer economic union, to the point that the drivers of that process have been seen to be a “functional” tendency for an existing degree of integration to create a ramifying need for further integration.⁴⁸

The Common Market

By 1958 three distinct “communities” had been formed: the European Coal and Steel Community (ECSC); the European Economic Community (EEC); and Euratom, an agency for the joint development and regulation of nuclear energy. Of these, it was the EEC that became the centre-piece of European integration. Later renamed simply the European Community (EC), but referred to as the Common Market, it was very similar to, but more ambitious than, Germany’s *Zollverein* of the nineteenth century.⁴⁹ Powers necessary for the regulation of a European market free of trade barriers and with a common external customs union would be given to supranational regulation by the European Commission in Brussels. All other powers would remain in the domain of the member states.

The European Union

Until the 1970s, the favourable circumstances of the postwar boom years allowed traditional nation-state competition within a common market area. Due to French president Charles de Gaulle’s veto in 1966, the decision-making

46 See Walter Lipgens (ed.), *Documents on the History of European Integration: Continental Plans for European Union 1939–45*, 2 vols. (Berlin: Walter de Gruyter, 1984).

47 See Mark Gilbert, *Surpassing Realism: The Politics of European Integration since 1945* (Lanham, MD: Rowman & Littlefield, 2003).

48 The classic expression of this is Ernst Haas, *The Uniting of Europe: Political, Social, and Economic Forces, 1950–1957* (Stanford, CA: Stanford University Press, 1958).

49 Unlike a mere customs union, a common market entails full mobility of labour and capital between jurisdictions. The next highest level of economic integration after that is a monetary union, where a single currency replaces separate national currencies, and after that an economic union, where a common economic policy is in operation.

process essentially remained unanimity-based, even though the Treaties had foreseen a gradual transition to **qualified majority voting** (QMV). During the 1970s, however, the collapse of the US-led Bretton Woods monetary system, the tripling of oil prices during the OPEC (Organization of the Petroleum Exporting Countries) crisis, wage pressures, and the saturation of many traditional consumer markets brought inflation, unemployment, sluggish growth, and currency instability. Common-market policies were no longer sufficient. Increasingly, pressure for more comprehensive integration policies came from the Commission, and from the policy networks it had created with government specialists and organized interests. As Riker had conceded, European integration became a process driven primarily by economic interest rather than common security concerns.

Increasingly also, efficient governance in an ever larger union became an issue. By 1987, membership had doubled from the original 6 member states to 12. The debate about Europe's future came to be cast in terms of **widening and deepening**. Reluctant Europeans such as British prime minister Margaret Thatcher had always favoured membership enlargement because they believed that a wider and more diverse union would also be a weaker, more confederal, union. Enlargement would provide the double benefit of opening up an ever larger market and thinning out the possibility of strong central governance. Committed Europeans like the Germans, on the other hand, insisted that the kind of market enlargement they favoured had to go hand in hand with a deepening of the decision-making process: more qualified majority voting in more areas, and more co-decision powers to the European Parliament in order to enhance legitimacy.

The *Single European Act* of 1987 and the Maastricht or European Union Treaty of 1993 accomplished a qualitative jump toward deepening. The common market was extended to economic and monetary union (EMU), including a European Central Bank. Most economic decisions would finally be subjected to qualitative majority voting (QMV), at least in principle (see Chapter 9). A common social policy framework would be established in market-related matters such as health and safety for workers. Political cooperation would be intensified in areas of foreign policy and domestic security.

The outcome was still a federalist compromise among modernizers and traditionalists, albeit one that reflected the traditional concerns of sovereign nation-states: foreign and domestic security policy would be kept away from the community method of qualified majority voting alongside core areas of social policy; opt-outs from certain policy programs would be allowed for individual member states; and the newly adopted principle of subsidiarity (see Chapter 6) would hold EU powers to criteria of efficiency (a policy objective could be reached better by common than individual member-state action) and proportionality (common action could only go as far as the objective required).

Treaty Federalism

By the time the Maastricht Treaty went into effect, the Berlin Wall had come down and communism had collapsed. Before long, there was the prospect of ten more Eastern European states entering the Union.⁵⁰ The problem of governance had taken on an entirely new dimension. Widening, as it appeared to a growing number of concerned politicians, now required a more decisive step toward deepening. In order to remain functional, EU governance had to become both more efficient and more democratic.⁵¹

The Treaty of Nice, however, signed in 2001, appeared to many as making governance even more complicated. Even though QMV (rather than unanimity) was extended to more policy areas, the reweighted formula of member-state votes in anticipation of drastic enlargement did not lower the threshold for the adoption of a decision. Intergovernmentalism would prevail, and with it a lack of transparency and accountability. This triggered calls for the transformation of Europe from a treaty-based union to a constitutional federation. What followed was the Convention on the Future of Europe: comprising representatives of member-state governments and parliaments, of the European Parliament, of the Commission, and of 13 applicant countries, within little more than a year (2002–03) it had produced the draft of a Treaty establishing a constitution for Europe.

While the European Convention was extraordinary and perhaps even comparable to the Philadelphia Convention, the outcome was not. Far from the parsimonious document the Americans had produced some 200 years earlier, the Constitutional Treaty (CT) as revised and signed in 2004 was a convoluted document of 482 pages that provoked doubt rather than confidence about efficiency, transparency, and accountability in the future of European governance. Moreover, and for this reason rather than objection to any particular set of stipulations, it failed when the French and Dutch electorates rejected it in national referendums.

However, its key institutional and procedural features were rescued and incorporated into the 2009 Treaty of Lisbon. Under the Lisbon rules, co-decision rights of Council and Parliament now extend to nearly all decisions; as of 2014 the complicated QMV formula has been replaced by a simpler double-majority formula; and the member-state parliaments have been given a consultative role and suspensive veto regarding the adherence of all legislative acts to the principle of subsidiarity. At the same time, however, European Union

50 With the accession of Croatia as of 1 July 2013, EU membership now stands at 28.

51 On the following see Clive Church and David Phinnemore, "From the Constitutional Treaty to the Treaty of Lisbon and Beyond," in Michelle Cini and Nieves Pérez-Solórzano Borragán (eds.), *European Union Politics*, 4th ed. (Oxford: Oxford University Press, 2013).

federalism will remain a form of treaty federalism: the European Council (of government leaders) has been formalized as part of the institutional design and will continue to give direction to the integration process by means of inter-governmental consultation and agreement; and treaty changes will continue to require unanimous approval by all member states, which have even been given a right of secession.

Distinct, but Not Sui Generis

The EU represents an experiment in federalism. It is the first attempt to fuse a large number of established nation-states with different cultures, languages, and national identities—not to mention a shared history of often bitter and sometimes horrendous conflict—as well as highly developed political systems, bureaucratic apparatuses, and comprehensive welfare states. It is not surprising, then, that the EU has taken a distinctive form that for now comprises federal and confederal elements of institutional design. It is also distinctly asymmetrical—as, for instance, in the case of the Euro-zone, which so far only 17 of the 28 member states have joined. And from the perspective of a conventional federal state it is distinctly incomplete insofar as its monetary powers are not matched by economic, budgetary, and fiscal powers; these remain with the member states (see Chapter 7).⁵² As the recent and ongoing financial crisis has shown, the process of European integration is as yet open-ended. The eventual outcome may be more federalism if the EU proceeds to establish a banking and fiscal union; it also may be more confederalism if intergovernmental crisis management remains in the hands of political leaders.⁵³ One major obstacle that even the functional pressure for more economic integration will have difficulty surmounting is the uniqueness of the EU in bringing together established nation-states: can Europe be a political community?⁵⁴ For these and other reasons, a number of commentators see the process of European integration as having reached a “plateau.”⁵⁵

Because of this distinct mix of power allocations, we treat the EU as a model in its own right. Also because of this mix, however, it has long been fashionable

52 See Amy Verdun, “Economic and Monetary Union,” in Michelle Cini and Nieves Pérez-Solórzano Borragán (eds.), *European Union Politics*, 4th ed. (Oxford: Oxford University Press 2013), 306.

53 See Dermot Hodson and Uwe Potter, “The European Union and the Economic Crisis,” in Michelle Cini and Nieves Pérez-Solórzano Borragán (eds.), *European Union Politics*, 4th ed. (Oxford: Oxford University Press 2013), 367–79.

54 See, for instance, Jonathan White, “Europe and the Common,” *Political Studies* 58.1 (2010): 104–22.

55 As argued in Andrew Moravcsik, “The European Constitutional Settlement,” *The World Economy* 31.1 (2008): 158–83; see also Giandomenico Majone, *Europe as the Would-be World Power: the EU at Fifty* (Cambridge: Cambridge University Press, 2009).

to speak of the EU as a political system *sui generis*—a unique case.⁵⁶ If that were so, its inclusion into a comparative exploration of federalism would hardly make sense. Yet the comparative method does not so much focus on entire systems or countries—which in this holistic sense would *all* appear *sui generis*—as it makes its case, in this chapter, by looking at similar dynamics in the formation of institution design and procedures within such systems. In this way, for example, the European Council (of Ministers) can be seen as having been formed after the model of the German *Bundesrat* (see Chapter 8); the evolving division of powers follows familiar patterns (see Chapter 6); judicial review has likewise played a not unfamiliar role (see Chapter 11); and the continued European reliance on intergovernmental bargaining can be compared to the development of executive federalism in Canada (see Chapter 9).

Imitations and Variations

The general process and dynamic of federal state formation can be understood and appreciated quite well from these few basic models. Most of the other and subsequent federations in some way learned from and imitated these models—with the obvious exception of the European Union, which still awaits imitation in future processes of regional or even global integration. Yet it would be short-changing the variety of federal experiences elsewhere if we did not canvass, briefly and illustratively, some of the significant variations of federal state formation that have played out in different settings.

Switzerland as a Paradigmatic Case

Although it has a very long confederal history, Switzerland only became a modern federal state in 1848. We do not treat it as one of our basic models because its constitution is a blend of elements borrowed from the already existing American model (e.g., construction of the upper house); traditional elements of power division shared with the German model (e.g., administrative federalism); and a distinctively Swiss commitment to direct democracy (e.g., obligatory referendums for all constitutional changes) that is incidental to federalism. Its history, however, deserves special mention because it powerfully illustrates how federal unions are likely to emerge from a combination of strategic, economic, and cultural factors. In fact, one of the most famous political scientists of the twentieth century called Switzerland a paradigmatic case of political integration.⁵⁷

The Helvetic Confederation had its beginnings in a common interest among its original three members—Schwyz, Uri, and Unterwalden—of defending their

⁵⁶ See Steven B. Wolinetz, "Comparing the Incomparable: Treating the EU in Comparative Context," in Finn Laursen (ed.), *The EU and Federalism* (Farnham, UK: Ashgate, 2011), 27–39.

⁵⁷ Karl W. Deutsch, *Die Schweiz als ein Paradigmatischer Fall Politischer Integration* (Bern: Paul Haupt, 1976).

autonomy against external domination. By the sixteenth century, the confederation they had launched with their compact, the *Bundesbrief*, of 1291 had grown to 13 cantons and a number of associate communities. Its only institution of joint governance was the *Tagsatzung*, an assembly of delegates not unlike that of the United States under the *Articles of Confederation*. However, the *Tagsatzung* had no formal constitutional existence; it required unanimous agreement on all decisions; and "and each canton retained the right to reject decisions with which it did not agree."⁵⁸ This worked as long as the primary common interest still was securing trade routes and the surrounding agricultural land. But joint governance came to a standstill when the Reformation divided the confederation into Catholic and Protestant cantons and religious war ensued. After the battle of Kappel (1531), the territorial principle of cantonal religious self-determination was established. At that time, territoriality also became the guarantor of lasting linguistic accommodation (German, the official language until 1798, as well as French, Italian, and Romansch).⁵⁹

Dramatic change toward modern federalism occurred only after an interlude of Napoleonic invasion, the imposition of a centralized republic (1798–1815), and with it exposure to modern ideas of social and economic liberalism. Well before this, the original confederation had become "an institutional fossil."⁶⁰ The restoration of cantonal government in 1815 brought a much enhanced constitutional arrangement, moving Switzerland from a glorified alliance to a genuine confederation, but by this point even an updated form of confederalism was becoming decidedly anachronistic in the rapidly modernizing and industrializing Europe of the mid-nineteenth century. This was particularly the case in that the new confederation did not include common weights and measures, currency, or an end to cantonal customs tariffs.⁶¹ Change came in the form of a conflict between mainly Protestant modernizers living in the more urban and industrializing cantons, who wanted a transformation of the confederation into a modern federal state with efficient central powers and a common market, and mainly Catholic traditionalists living in the more rural cantons, who wished to preserve both their privileges and the dominant role of the Catholic Church in political and cultural life. This was reinforced by an ongoing sense of external threat.⁶²

58 Frederick K. Lister, *The Early Security Confederations: From the Ancient Greeks to the United Colonies of New England* (Westport, CT: Greenwood, 1999), 77.

59 See Kenneth D. McRae, *Conflict and Compromise in Multilingual Societies: Switzerland* (Waterloo, ON: Wilfrid Laurier University Press, 1983), 39–47.

60 Lister, *The Early Security Confederations*, 67.

61 Lister, *The Later Security Confederations*, 105–11.

62 Lister, *The Later Security Confederations*, 116.

In 1845, the Catholic cantons, feeling threatened by growing Protestant aggressiveness, joined in a separate treaty, the *Sonderbund*, in order to defend their common interests. In 1847, they left the *Tagsatzung*, and the Protestant cantons interpreted this as an act of secession. A short civil war ensued, the *Sonderbundskrieg*. After only 26 days and a minimum of blood spilled, it ended with the defeat of the secessionists and, a year later, with the adoption of a new and genuinely federal rather than confederal—constitution.

As in the American case, this constitution created a central government elected by the people rather than by the cantons, and with the power to act on the people directly rather than only through the cantons. But much more so than in the American case (or even most other cases), it safeguarded cantonal autonomy and diversity and thus can be credited with the fact that religion and language simply are no longer salient issues in Swiss federalism.

Hispanic Federations

While the federations of Latin America followed American governmental design very closely, institutional similarities tend to obscure the fact that the Latin American road to federalism was quite different.

As we saw in the case of the United States, Americans were reluctant to endorse a new form of union government that for many looked too much like the kind of European state absolutism the original settlers wanted to leave behind. Hence it was the modernizers who sought to superimpose the vested interests of separate settler societies with the central institutions of modern governance. In Latin America, however, colonial rule had left a heritage of both authoritarian centralism and clientelist regionalism; modernization therefore produced different patterns of state formation. We focus our discussion on two contrasting cases, Mexico and Brazil.

Mexico

Fully independent since 1821, Mexico had already endured three years of political turmoil when the first federal constitution was drafted in November 1823. The battle lines between modernizers and traditionalists were clearly drawn, although in reverse order and fashion. While the Spanish conservatives—clergy, army officers, and landowners—favoured a centralist regime, the modernizing liberal middle classes—mostly of mixed Spanish and Indigenous ancestry—supported federalism.⁶³ After the oppression of 300 years of centralist despotism and the “irresistible” example of the United States, the federalists carried the day.

⁶³ See Michael C. Meyer and William L. Sherman, *The Course of Mexican History* (New York: Oxford University Press, 1979), 313–16.

The first federal republic lasted only little more than a decade, and for the next 100 years, federalism was not a major concern in Mexican politics. In between military dictatorships, foreign occupation, civil war, and revolution, there was only one return to republican federalism, in 1857, and it lasted less than a decade. Under external threat from the United States, the new constitution adopted at that time strengthened central and executive powers. So did the third federal constitution of 1917, created amidst a decade of revolution and chaos. It turned out to be the one Mexicans would keep.

Political stability and economic modernization, however, came with seven decades of centralist and authoritarian government by the Institutional Revolutionary Party (PRI) between 1929 and 2000. Federalist renewal had to wait until the 1980s, when opposition parties began to score electoral victories in cities and, subsequently, states. The history of the Mexican federalist compromise seemed to have come full circle as, once again, federalism challenged the traditional preference for a centralist regime with clientelist links to the periphery.⁶⁴ In the process, it provided fertile opportunities for democratization.⁶⁵ For the opposition victory in the 2000 federal election, federalism provided both the institutional tools and the ideological ammunition. The return to power of the PRI in 2012, however, raises the question of whether Mexico will once more return to its old ways or whether lasting degrees of federal balance and democratic stability have been established.

Brazil

The case of Brazil is quite different.⁶⁶ Brazil gained independence from Portugal in 1822, and, after a military revolt, a federal republic was created in 1891. The essential institutional elements—a presidential system with a bicameral congress—remained in place and operation, most of the time, throughout a history that saw eight constitutions and republican rule interspersed with civilian as well as military dictatorships. Although sharing borders with all but 2 of the 12 surrounding countries in South America, external threat was never a serious issue. And by contrast with Mexico, the conflicts of modernizers and traditionalists followed the usual pattern, as traditional regional elites opposed modernizing impulses from the centre. Indeed, one might argue that the modernizers were altogether excluded from the original federalist compromise. Colonial administrations had created a loose clientelist network across

64 See Victoria E. Rodríguez and Peter M. Ward (eds.), *Opposition Government in Mexico* (Albuquerque: University of New Mexico Press, 1995).

65 Enrique Ocha-Reza, "Multiple Arenas of Struggle: Federalism and Mexico's Transition to Democracy," in Edward L. Gibson (ed.), *Federalism and Democracy in Latin America* (Baltimore, MD: Johns Hopkins University Press, 2004), 255–96.

66 See Celina Souza, *Constitutional Engineering in Brazil: The Politics of Federalism and Decentralization* (New York: St. Martin's Press, 1997).

Brazil's vast territorial expanse. Federalism became not so much a tool of liberalization as a device to secure the interests of traditional regional elites in the Congress.

From the 1930s onward, the balance of power began to shift decisively toward the centre. Inevitable economic modernization required government intervention and improved social stability. The national government was given full trade and commerce powers. The self-governing rights of the states were all but suspended by a dictatorial regime of supervision. Under the pretext of putting an end to congressional paralysis, the military dictatorship after 1964 for all practical purposes transformed Brazil into a unitary presidential regime.

It can hardly be surprising that the final process of democratization, begun in 1985 with the return of civilian rule, went hand in hand with calls for decentralization. Primarily with lasting democratization in mind, the eighth (and so far last) Brazilian Constitution established a "three-tiered federation" with autonomy guarantees for the union, states, and municipalities. The constitution identifies a wide area of important policy fields to be held "in common" (e.g., health services) as well as an extensive list of concurrent powers (including taxation) where union legislation is limited to "general rules." While skeptical observers feared that this would render the federation "largely inefficient," others welcomed it as entirely within the logic of flexible and democratic federalism.⁶⁷

At least initially, the skeptics appeared to be proven right, as decentralization became a "disorganized process in which the states and municipalities behave like predators of a politically and fiscally wounded federal government."⁶⁸ Beginning with the presidency of Henrique Cardoso (1995–2003), however, the Brazilian federation began to consolidate by adopting a more principled and balanced form of intergovernmental relations that in particular included public debt control and a cooperative reform of health and education.

British Empire Federations

It is one of the more curious peculiarities in the history of federalism that one of the most notoriously unitary states, Britain, actively promoted federation throughout its vast colonial empire. Given the enormous diversity of that empire, the processes, outcomes, and successes of federal state formation were vastly different as well. In fact, among the six territories released into federal statehood from British colonial rule since 1900, in Australia, Asia, Africa, and on the Arabian peninsula, only Australia and India have thus far developed as stable and

67 See Marcus Faro de Castro and Gilberto Marcos Antonio Rodrigues, "Brazil," in Luis Moreno and César Colino (eds.), *Diversity and Unity in Federal Countries* (Montreal: McGill-Queen's University Press, 2010), 84–86.

68 Valeriano Medes Ferreira Costa, "Brazil," in Ann L. Griffiths and Karl Nerenberg (eds.), *Handbook of Federal Countries, 2002* (Montreal: McGill-Queen's University Press, 2002), 94.

democratic federations.⁶⁹ It is on these two and again contrasting cases that our comparative discussion will focus. In Australia, colonial societies of British settlers and immigrants scattered across a vast continent accepted the idea of union rather cautiously and without the kind of cultural necessity that had made federalism inevitable in Canada. In India, on the other hand, the task of federal state formation fell into the hands of an immensely diverse indigenous society left with a legacy of quasi-federalist administrative institutions after independence.

Australia

In the case of Australia, the first federal initiative indeed came from Britain. Around the mid-nineteenth century, the Colonial Office proposed a general assembly in order to settle inter-colonial Australian disputes directly; the colonies, however, were not inclined to listen. An intergovernmental Federal Council was established in 1885 for the purpose of coordinating security and immigration policies, but not all agreed to join and it remained ineffectual. The colonies had developed independently; they had achieved responsible self-government separately; they were geographically separate, with little contiguity of population;⁷⁰ and they shared little economic integration. On top of all that, they had little sense of strategic insecurity at this stage, being both geographically privileged and firmly beneath the imperial umbrella: "In any attempt to account for the lack of interest in federation, faith in the Royal Navy has to be seen as an important and persistent factor."⁷¹

When the Australians finally agreed upon the formation of a federal union in 1900, they did so, as in most other cases, in no small part for reasons of economic modernization. A rapid increase in population began to reduce the physical distance of separate settlements. However, it also reflected the emergence of a distinct national identity as the native-born population came to exceed the transplanted.⁷² And there was the growing realization that combined forces were necessary in order to participate successfully in an emerging regime of international trade and commerce driven by the interests of powerful nation-states. If there was any single driver to the process, it was the mundane demand for a solution to cross-border issues between the two leading colonies, Victoria and New

69 New Zealand experimented with a federal arrangement in 1852 (*New Zealand Constitution Act*) but with the passage of the *Abolition of the Provinces Act* in 1876, settled on unitary statehood.

70 W.G. McMin, *Nationalism and Federalism in Australia* (Oxford: Oxford University Press, 1994), 30.

71 McMin, *Nationalism and Federalism*, 82.

72 McMin, *Nationalism and Federalism*, 124. On the contribution specifically of an emerging national consciousness to the federal movement, see John Hirst, *The Sentimental Nation: The Making of the Australian Commonwealth* (Melbourne: Oxford University Press, 2000).

South Wales. But there were no fundamental rifts between modernizers and traditionalists in Australia. It simply was a pragmatic case of late state formation.

This is not to say that everybody agreed. In fact, the most distinctive characteristic of the Australian case is that the federal Commonwealth was constructed from a process of public deliberation. The federal option gained momentum gradually, over a period of 50 years, in political speeches and newspaper articles and at various inter-colonial meetings and conventions. The first of these conventions, in 1891, provided a constitutional blueprint. The second one, in 1897–98, produced the final draft. But even that draft had to be amended again after it was rejected at referendum in the most important colony, New South Wales.⁷³

On the one hand, then, federal state formation in Australia was not driven by a critical historical juncture as in the United States, Canada, and Germany. This is particularly evident in the way in which the different elements of the constitutional design were cobbled together by imitating previous federal experiments elsewhere, without aligning the final outcome to any particular Australian rationale: a fusion of executive and legislative powers in the parliamentary chamber as in Canada; equal state representation in a directly elected senate as in the United States; and a double-majority referendum requirement for constitutional amendments as in Switzerland.⁷⁴ On the other hand, however, Australian state formation can still be seen as based on a compromise that speaks to the core of the federalist idea: creating a central government with sufficient powers to manage the affairs of a common continental destiny, while preserving the self-governing powers of constituent member states with “distinct geographies,” even if these included only “subtle variations in political culture.”⁷⁵

India

In significant ways, the case of India differs from all others yet again, and not only because independent state formation was deferred to the middle of the twentieth century. India was under British rule but was not a settler colony. In stark contrast to Hispanic America, its own societies had not been destroyed. It neither possessed the social and ideological cohesion for an early and revolutionary break from colonial rule, as in the American case, nor counted on benign neglect, as in the Canadian case. While India's economic importance

73 W.G. McMinn, *A Constitutional History of Australia* (Melbourne: Oxford University Press, 1979), 115–17; see also J.A. La Nauze, *The Making of the Australian Constitution* (Carlton: Melbourne University Press, 1972).

74 See Cheryl Saunders, “Commonwealth of Australia,” in Katy Le Roy and Cheryl Saunders (eds.), *Legislative, Executive, and Judicial Governance in Federal Countries* (Montreal: McGill-Queen's University Press, 2006), 40.

75 Nicholas Aroney, “Australia,” in Luis Moreno and César Colino (eds.), *Diversity and Unity in Federal Countries* (Montreal: McGill-Queen's University Press, 2010), 19.

for the British Empire peaked during the nineteenth century, Canada's role as a resource provider declined.

An organized nationalist movement had existed since 1885, when the Indian National Congress was established, but its cohesion and driving force were constrained by two structural impediments. On the one hand, British India included two major religious groups, Hindus and Muslims, who were reluctant to co-operate. On the other hand, British India not only contained directly administered provincial territories but also a multitude of autonomous states under the rule of Indian princes who had accepted British paramountcy but could effectively govern any way they wanted as long as their conduct was not deemed detrimental to British interests. By contrast with China, for example, it also had a long history of fragmented rather than unified governance.⁷⁶

The British did make several attempts to accommodate Indian requests for self-rule. Of these, the 1935 *Government of India Act*, fashioned after the Canadian *British North America Act* of 1867, went furthest in offering a federal scheme of self-administration, self-government for elected provincial legislatures in the territories, and a bicameral national legislature. Governance in the states remained untouched, however, and the state representatives in the upper chamber of the national legislature were not elected but appointed by the princely rulers, who were, in the words of Mahatma Gandhi, "British officers in Indian clothes."⁷⁷

By the time independence had been achieved and a constitution was being drafted by the national legislature acting as a constituent assembly, one of the impediments in the way of national unity had been removed by the creation of Pakistan as a separate Muslim state. This allowed the nationalist modernizers to press for a "federation with a strong Centre."⁷⁸ Stripped of British protection, the princes were coaxed into the fold by persuasion, appeals to the local population, and, in one case, police action. The integrity of state boundaries was deliberately not constitutionally guaranteed. With two exceptions, the states were also denied their own constitutions. The set-up of legislative, executive, and judicial institutions was uniformly prescribed. By means of extraordinary emergency powers the central government could effectively and unilaterally take over the administration of individual states, a provision occasioned by the anticipation of ethnic unrest, as well as by external threat, as the conflict with Pakistan over Kashmir was already brewing.

76 S.E. Finer, *The History of Government from the Earliest Times. Volume III: Empires, Monarchies, and the Modern State* (Oxford: Oxford University Press, 1997), 1211; see also Francis Fukuyama, *The Origins of Political Order: From Prehuman Times to the French Revolution* (New York: Farrar, Straus and Giroux, 2011).

77 Quoted in K.R. Bombwall, *The Foundations of Indian Federalism* (Bombay: Asia Publishing House, 1967), 203.

78 Bombwall, *The Foundations of Indian Federalism*, 256.

The traditionalists for the most part lost. They had wanted a territorial reorganization along ethno-linguistic lines. While the constitution initially recognized 14 regional languages, the Congress nationalists wanted to avoid giving linguistic tensions a territorial basis—to avoid the dangers of “excessive federalism.”⁷⁹ Therefore, the federalist compromise initially remained incomplete. Over the next two decades fraught with ethnic tension and violence, however, new linguistic state boundaries were drawn up, in part by breaking up some of the previous plurilingual states, and in part by creating new ones.⁸⁰ This process has meanwhile doubled the number of states from the original 14 to the current 28, with possibly several more pending.

The Indian federal union was very much the project of the Congress Party, which, because it was the only broadly based national party, dominated and governed Indian politics unchallenged and in centralist fashion for much of the first four decades after independence. In the meantime, however, Indian federalism has moved from overbearing central control to a more “cooperative union.”⁸¹ In the main, this ongoing process is owed to the rise of regional parties and their participation in government coalitions at the centre, and one important reason for this in turn has been the transformation of territorial states into linguistic ones. Somewhat counterintuitively, this accommodation of language has consolidated rather than destabilized Indian union and unity.⁸²

Devolutionary Federalism

Thus far, we have dealt with cases of federal state formation that brought previously separate or independent units together in a common union. These are our main cases. However, our survey would not be complete without considering some recent cases of federalization—those of Spain, Belgium, and South Africa—that took the opposite direction, decentralizing or devolving previously unitary states into federal systems.

Spain

The case of Spain is exemplary for the use of federalism as a tool of democratization. General Francisco Franco, Spain’s fascist dictator for 36 years, died in 1975. Three years later, Spain had a democratic constitution that granted quasi-federal

79 Balveer Arora, “Republic of India,” in Luis Moreno and César Colino (eds.), *Diversity and Unity in Federal Countries* (Montreal: McGill-Queen’s University Press, 2010), 201.

80 See J.C. Johari, *Indian Government and Politics* (Delhi: Vishal Publications, 1976), 15–61.

81 See Akhtar Majeed, “Republic of India,” in John Kincaid and G. Alan Tarr (eds.), *Constitutional Origins, Structure, and Change in Federal Countries* (Montreal: McGill-Queen’s University Press, 2005), 202–5.

82 See Will Kymlicka, “Multi-Nation Federalism,” in Baogang He, Brian Galligan, and Takashi Inoguchi (eds.), *Federalism in Asia* (Cheltenham, UK: Edward Elgar, 2007), 48–49.

rights of regional self-governance and eventually resulted in the creation of 17 “autonomous communities.” Franco had viciously suppressed all manifestations of regionalism, especially in Catalonia, which had a long tradition of rebellious republicanism. Because of this rigid centralism, democratic renewal was almost universally associated with the recognition of regional rights as the non-negotiable precondition for genuine democracy. Reinforcing the inseparability of democratization and federalization in Spain was the country’s long-standing “ethnoterritorial diversity.”⁸³

As is common during transitions from authoritarian rule to democracy, there could have been bloodshed or even civil war. For two main reasons, however, this was avoided. First of all, the Franco regime had been successful in modernizing Spain’s economy and much of its society. This had created a stabilizing middle class. Second, while a monarchy was restored, as Franco had wanted, the monarch, Juan Carlos, made an early and unequivocal commitment to full democracy. This further bridged the gap between conservative traditionalists who wanted to preserve the privileges they had enjoyed under the dictatorship and the modernizers who expected equal opportunity from liberalization.

However, the main dividing lines that had to be addressed by the constitutional settlement ran between centralists and regionalists. The three historic regions—Catalonia, the Basque Country, and, to a lesser extent, Galicia—revived old nationalist traditions that they now expected to be recognized. A strong regionalist movement also existed in Andalucía. Some of the other regions did not even have clear boundaries.

Essentially, the solution was a federalist compromise, which, apart from a bicameral national legislature with a weak senate, contained three innovative features.⁸⁴ First, the constitution did not create regional self-government but instead left the initiative to the regions themselves. These had to form pre-autonomous assemblies, which would then negotiate individual “statutes of autonomy” with the central government before being approved by regional referendums. A “privileged” path to autonomy was provided for the historic regions, whereas the others had to follow a more cumbersome “normal” path.

Second, the constitution distinguished between immediate “high”-level autonomy for the historic regions following the privileged path and “low”-level autonomy under the normal path. Additional provisions allowed “exceptional” applications for full autonomy (used by Andalucía), as well as individually negotiated additional power packages (used by Valencia and the Canary Islands). Third, while most tax-raising powers effectively remained with the central government, and a 15-per-cent income-tax transfer to the autonomous communities

83 Luis Moreno, “Federal Democracy in Plural Spain,” in Michael Burgess and Alain-G. Gagnon (eds.), *Federal Democracies* (Abingdon, UK: Routledge, 2010), 160–77.

84 See Michael Keating, *The Politics of Modern Europe: The State and Political Authority in Major Democracies*, 2nd ed. (Cheltenham, UK: Edward Elgar, 1999), 343–58.

came into effect only in 1993, the Basque Country and Navarra were allowed to retain their medieval *fueros* rights of fiscal autonomy, by which most taxes are collected locally and a percentage is in turn passed on to Madrid.

The Spanish case thus demonstrates a new kind of procedural as well as institutional flexibility in the gradual accommodation of diversity. The provision of different paths to autonomy was meant to accommodate the immediate aspirations of the historic regions on whose support the stability of the new democratic state depended. The asymmetrical differentiation of power packages in turn served the interests of economically stronger and weaker regions. How to avoid competitive regionalism and how to square the asymmetrical distribution of powers with a fair distribution of revenue, however, have remained particular problems.

Yet it seems that external necessity—rather than threat—has been playing its part in the consolidation of federalism once again: the necessity of uniform compliance with European laws and regulations. It has compelled Spain to develop a cooperative mode of intergovernmental relations.⁸⁵ At least initially, that is: with the onset of the European economic and financial crisis, tensions have increased particularly in Catalonia, where economic recession and unemployment have strengthened secessionist sentiments.

Because the autonomy of the communities is statutory—like a set of bilateral pacts between the two levels of government—and because the constitution itself speaks of the “one and indivisible nation,” some argue that Spain is not a federation; it is not based on a constitutionally guaranteed regime of shared sovereignty.⁸⁶ However, this view overlooks the fact that “regional statutes are treated as constitutional law”; that the Constitutional Court has a mandate to review national legislation infringing upon territorial autonomy; and that constitutional amendments require approval from a senate that is in part composed of members appointed by the regional legislatures. Spain, in other words, can be treated as a “de facto federal state in all but name.”⁸⁷ If anything, the challenge to Spain’s federal nature comes from the other direction, as Catalonia pushes for a referendum on independence (see Chapter 10).

Belgium

Belgium gained independence in 1830. Perched in between France, Germany, and the Netherlands, it was composed of a French-speaking part in the south,

85 See Tanja A. Börzel, “From Competitive Regionalism to Cooperative Federalism: the Europeanization of the Spanish State of the Autonomies,” *Publius* 30.2 (2000): 17–42.

86 See, for example, John Loughlin, “Federalism, Regionalism and Local Government: Comparative Perspectives on Transforming the Nation-State,” *European Political Science* 7 (2008): 476.

87 Luis Moreno and César Colino, “Kingdom of Spain,” in Luis Moreno and César Colino (eds.), *Diversity and Unity in Federal Countries* (Montreal: McGill-Queen’s University Press, 2010), 291–92, 302.

Wallonia, and a Dutch-speaking part in the north, Flanders. In addition, a bilingual region evolved around the capital region of Brussels, and a small German-speaking minority remained in eastern Wallonia, close to the German border. All communes (municipalities) belong to one of these four linguistic regions and are, with the exception of Brussels, unilingual. Thus Belgium has always been an inherently federal society. A national balance of sorts existed insofar as the Flemish constituted the more numerous part of the country, whereas Walloons possessed a stronger economy. When this economy faltered, however, tensions began to mount between the two main ethno-linguistic groups, driving the country to the brink of a break-up and making unitary government non-viable.

Several rounds of federalization were initiated after 1970, culminating in the federal constitution of 1993.⁸⁸ Apart from reforming the bicameral legislature without, however, giving the senate equal powers, the emphasis of the new federalist compromise was entirely on the creation of a complex system of subnational self-government. To this end, the new constitution recognized not only three territorial "regions" (Wallonia, Flanders, and Brussels), but also three autonomous cultural "communities" (French, Flemish, and German). Both regions and communities have separate and exclusive powers of self-government exercised by directly elected councils.

The regional councils of the two main language groups perform territorially bounded tasks such as infrastructural planning and economic development. Community councils, on the other hand, comprising representatives from the two regions as well as from the bilingual region of Brussels-Capital, perform tasks in the fields of culture, language, and education that extend beyond regional boundaries to all members of the cultural communities. Brussels-Capital has its own government elected from separate lists of the two language groups. The autonomy of the German minority is more limited. On community matters, their council has powers similar to those of the others. On regional matters, on the other hand, their representatives are part of the Walloon Regional Council.⁸⁹

Perhaps even more importantly, given the complex array of overlapping jurisdictions, the constitution provides extensive mechanisms of cooperation, concertation, and arbitration. By creating a novel form of federalism recognizing two different manifestations of subnational autonomy—territorial and cultural—the Belgian federalist compromise appears far more procedural than institutional. It

88 See Robert Senelle, "The Reform of the Belgian State," in Joachim Jens Hesse and Vincent Wright (eds.), *Federalizing Europe? The Costs, Benefits, and Preconditions of Federal Political Systems* (Oxford: Oxford University Press, 1996), 267–70.

89 The Belgian Constitution allows the collapsing together of community and regional governance. Thus there is only one Flemish Council for both community and region, whereas separate councils have been retained for the French-speaking community and region of Wallonia.

can and will work only if all participants can see rewards resulting from a perpetual and cumbersome process of deliberation and consensus-building. This in turn somewhat muddies the political waters of responsibility and accountability. But it may well give an indication of the direction federalism may take in the future when conflicting interests can no longer be identified as easily as those between modernizers and traditionalists, non-territorial identities have to be accommodated, and the old driving forces of state formation are being replaced with those of multilevel governance and interdependence.

For the Belgian federation itself, that direction is far from clear. The constitution of 1993 did little if anything to bring the two linguistic sides closer together.⁹⁰ Education, socioeconomic frameworks, and media systems are distinct—with the consequence that each side increasingly knows less about the other. Separate electoral districts for the two main language groups, the absence of national parties, and the constitutional requirement of linguistic parity in the cabinet make it difficult to form a government—during the 2007–08 stalemate, for example, it took nine months to do so. Further institutional and policy change toward confederal disaggregation may already be on the horizon, albeit without any clear blueprint or even vision for an eventual outcome.⁹¹

South Africa

At first glance, the South African case should be quite similar to the Spanish one: federalization used as a liberating mechanism to move from centralized authoritarianism to plural democracy. A closer look, however, reveals a somewhat different picture. In Spain, decentralization and regionalism were endorsed almost universally by the forces of democratic renewal; in South Africa, this was not the case. In Spain, federalism achieved democratic consolidation and stability; in South Africa, federalism remains at best a “work in progress.”⁹²

Federalism had disreputable connotations in South Africa for several reasons. The British parliament created a federal regime in South Africa in 1909, but this was for whites only. After 1948, the apartheid regime used the rhetoric of federalism to justify its policies of territorial and tribal segregation and discrimination. When change finally came, the dominant African National Congress (ANC) was a Marxist party committed to centralism and universalism. Support for a federalist polity came from the previously dominant National Party, which feared

90 See Frank Delmartino, Hugues Dumont, and Sébastien Van Drooghenbroeck, “Kingdom of Belgium,” in Luis Moreno and César Colino (eds.), *Diversity and Unity in Federal Countries* (Montreal: McGill-Queen’s University Press, 2010), esp. 58, 72–73.

91 See Wilfried Swenden and Maarten Theo Jans, “‘Will It Stay or Will It Go?’ Federalism and the Sustainability of Belgium,” *West European Politics* 29.5 (2006): 877–94.

92 On the following, see Richard Simeon and Christina Murray, “Multi-Sphere Governance in South Africa: An Interim Assessment,” *Publius* 31.4 (Fall 2001): 65–92.

unmitigated majority rule in a racially integrated South Africa, and the Inkatha Freedom Party (IFP), which sought radical autonomy for its KwaZulu–Natal province.

The dominance of the ANC and the intransigence of the IFP in particular made a federalist compromise all but inevitable. In 1993, agreement on an interim constitution was reached. Attached to it were “34 Constitutional Principles” that foreshadowed the future constitutional design by prescribing a division of powers between the central government and the provinces, as well as a commitment to subsidiarity whereby decisions should be made at the lowest appropriate level.

The drafting and adoption of the 1996 constitution were preceded by an extensive process of international consultation for the purpose of gaining a comparative view of various federal constitutions elsewhere. In the end, the nod went to the German model, albeit with significant variations that we shall discuss in Chapter 8. The reason for this was part of the compromise itself: the highly integrated nature of the German model with its concentration of legislative authority at the federal level swayed the ANC to accept federalism for the sake of democratic unity.

In principle, even though not formally identified as such, South Africa is now a constitutionally guaranteed federal state with three distinct “spheres”—federal, provincial, and local. In practice, however, it remains a fragile multilevel polity. Centralized federalism works well in Germany because it has been sustained by a traditional commitment to federalism as well as administrative capacity at the *Länder* level. It works not so well in a new and developmental federation like South Africa, where the provinces and localities in particular lack the governmental capacity to play their part in an overly complex system of intergovernmental coordination, administration, and service delivery, and where the emergence of a democratic political culture of federalism is held back by the dominant ruling party.⁹⁴

93 See Christina Murray and Richard Simeon, “Promises Unmet: Multi-Level Governance in South Africa,” in Rekha Saxena (ed.), *Varieties of Federal Governance: Major Contemporary Models* (New Delhi: Cambridge University Press, 2011).

Dividing Powers

WE SAW IN CHAPTER 5 how differing historical processes led some states to emerge in federal rather than unitary form. One implication of taking the federal route was that the governmental framework was established through an explicit process of negotiation and compromise. One of the most important issues on which agreement had to be reached was the way in which powers would be divided between the two levels of government. And just as different historical processes determined whether nation-states would be federal or unitary, so different historical processes determined what approach individual federations would take to dividing powers.

Those who worked out these compromises sought to design a structure that would function effectively and with reasonable efficiency, and that would preserve for posterity the kind of federal balance they valued. As a compromise between economic modernizers and cultural traditionalists, the division of powers was typically less contentious than the issue of representation that we discuss in Chapter 8. But the divergence between original intentions and eventual outcomes has often been wide. By dividing powers between two levels of government, federalism lays itself open to problems of misalignment as circumstances change. It also invites a struggle over jurisdiction and an ever-present tendency to translate distributional conflicts into intergovernmental ones. When such conflicts degenerate into political gamesmanship for electoral gain, citizens tend to object to the degree of inefficiency and surplus politics this seems to generate.

This chapter examines the constitutional settlement reached over the division of responsibilities in a range of major federal states. In the older federations, framers had few relevant examples to guide them in establishing a workable constitutional design and help them assess the relationship between codified frameworks and actual outcomes. They also set about their task in an era when government played an almost unrecognizably smaller role in economy and society, a role that could be conceptualized and divided with much greater ease, and when it was taken for granted that the bulk of government tasks were local rather than national in nature. More recent federations have been in the position to learn from their predecessors and, with varying degrees of effort and success, have tried to do so.

Issues, Decisions, and Approaches

Constitutional framers had to resolve at least three sorts of issues in the process of establishing the boundaries between the two levels of government. First, they had to settle on the way in which they were going to slice the functions of

government. Second, they had to decide where they were going to slice those functions: which tasks to assign where. And, third, they had to decide how best to give those decisions constitutional expression and permanence. The combined effect of these three sets of decisions we can call the approach they took.

Division of Powers or Division of Roles?

There are two ways in which the functions of government have been sliced: substantively and procedurally. Either the two levels of government can be assigned different substantive tasks or powers, or they can be assigned different procedural roles or functions. In Chapter 2 we labelled these legislative federalism and administrative federalism, respectively.

In the American model, discrete policy areas are assigned to the respective levels of government, with each level then being sovereign within its own policy fields. Thus, foreign affairs might be placed entirely within the jurisdiction of the national government, education entirely within the jurisdiction of the subnational governments. Each government takes full responsibility for policy-making, implementation, and administration within its respective areas of policy jurisdiction. In its classic application this has been termed **coordinate** or **dual federalism**.¹ Theoretically, legislative federalism should result in a system of separate spheres, where the respective levels of government operate in splendid isolation—what are commonly termed “watertight compartments”—accountable to their citizens for their assigned tasks. Since each level of government is thus self-contained, there is a diminished need for the constituent units to be represented in the national government. Legislative federalism, then, typically takes a divided rather than integrated form. In general terms, this is the model characteristic of the British settler federations—Australia, Canada, and the United States—as they were designed and originally envisaged to operate.

The alternative approach is for the bulk of policy responsibilities to be shared between the two levels of government rather than divided. Joint responsibility is accompanied by divided roles. The national government is assigned the general law-making role of providing overarching policy guidance for the federation, while the subnational governments are assigned the implementation and administration roles of putting the policy framework into local effect. This administrative federalism² almost necessarily entails input from the subnational governments in the process of national policy-making. Thus, as pioneered in

1 K.C. Wheare, *Federal Government*, 4th ed. (Oxford: Oxford University Press, 1963),

2 10.

2 *Verwaltungsföderalismus* (“administrative federalism”) is an old expression common in Germany, Austria, and Switzerland. However, the same idea is also described as “executive federalism”—in Germany, *Exekutivföderalismus*; in Switzerland, *Vollzugsföderalismus*—since it involves one level of government “executing” (implementing) the laws of another.

Germany, this integrated form of federalism means that subnational governments are represented directly in the second chamber of the national legislature.

Of course, legislative and administrative federalism are to some extent ideal types, with pure examples hard to find. There is no reason why elements of the two cannot be combined, and indeed we find some division of policy powers in the German system and some sharing of responsibilities in the British settler systems.

Principles of Assignment

Countries taking the approach of legislative and divided federalism then had to decide which policy fields should go where. What tasks are appropriately carried out at the national level and what at the subnational level? As summed up by nineteenth-century British constitutional doyen A.V. Dicey, there was little disagreement about the general principle: "Whatever concerns the nation as a whole should be placed under the control of the national government. All matters which are not primarily of common interest should remain in the hands of the several states."³ In other words, those activities of government whose costs and benefits can readily be contained within local boundaries should remain with the constituent units, while those activities whose costs and benefits will inevitably spill over into other jurisdictions ought to be transferred to the national government. If local jurisdictions retain control over tasks that create substantial undesirable spillovers—such as trans-boundary pollution—they will have little incentive to address the problem. Likewise, if local jurisdictions retain control over tasks whose benefits are broadly distributed beyond their own borders—such as scientific research—they will lack incentive to invest as much as might be desirable. And if jurisdictions retain responsibility for regulatory or redistributive functions where action on their part may reduce their attractiveness for business investment or constrain economic development, then they will come under competitive pressure to undersupply those goods. Subnational jurisdictions may well be inhibited from providing an optimal degree of environmental protection for such reasons, for instance.⁴

The spillovers logic coincided with the historical intentions of modernizers and traditionalists. The modernizers sought to remove from local particularisms those policy fields concerned with the functioning of a market economy:

3 A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1915), 139.

4 Inger Weibust, *Green Leviathan: The Case for a Federal Role in Environmental Policy* (Farnham, UK: Ashgate, 2009); Kirsten Engel and Susan Rose-Ackerman, "Environmental Federalism in the United States: The Risks of Devolution," in Daniel C. Esty and Damien Geradin (eds.), *Regulatory Competition and Economic Integration: Comparative Perspectives* (New York: Oxford University Press, 2001), 135–53.

customs tariffs, currency, patents, weights and measures, and trade. These were also the policy fields with extensive spillover effects. The policy fields jealously guarded by the traditionalists were those with very limited externalities at the time: education, social policy, health care, religion, culture, and, in multilingual societies, language. Federations typically, then, assigned responsibility for external affairs and the national market to the national government and responsibility for social affairs to the subnational governments. It was a viable compromise that allowed parochialisms and cultural diversity to coexist with economic modernization.

Patterns of Enumeration

If it was fairly obvious how powers should be divided, the task of enumerating them in a constitutional document with binding and lasting character turned out to be much more difficult. In fact, the division of powers in all federal constitutions contains ambiguities with unforeseen and unintended consequences that ultimately have to be sorted out by **judicial review** (see **Chapter 11**). Moreover, newer federations had to grapple with ever more complex responsibilities and assignment questions. As they developed over the years, a number of basic options can be identified nevertheless. Invariably, they revolve around the number of lists employed to enumerate powers, the question of whether enumerated powers should be **exclusive** or **concurrent** powers, and the assignment of **residual powers**.

The earliest approach was also the simplest: enumerate the powers assigned to one of the levels of government in a single list, and leave the powers of the other level of government implicit. Thus, for instance, a list of specified powers will be assigned to the national government that is being created while the constituent units of the federation will retain—explicitly or implicitly—the residue of powers they traditionally exercised. These residual powers will not be enumerated, because to do so would be to limit or confine them—and residual power is an open-ended plenary power: “We may assume that the assignment of the residual power to one or the other level of government indicates a preference . . . for maximizing the power of that level.”⁵ In other words, residual powers were a grant of privileged status of some form. Which level of government would be given this grant, however, depended on pre-existing power configurations. In the United States, Switzerland, and Australia, for instance, pre-existing constituent units created the federation, gave themselves the residual power, and assigned a limiting list of enumerated powers to the central government. In Canada and India, on the other hand, where the federation created the constituent units as

⁵ Garth Stevenson, “The Division of Powers,” in Richard Simeon (ed.), *The Division of Powers and Public Policy* (Toronto: University of Toronto Press, 1985), 81.

much as they created the union, it was the central government that was thus privileged.⁶

An alternative approach that is at least as intuitively appealing is to acknowledge the powers of both levels of government by drafting two separate lists. The two levels are thus granted equal presence in the constitution, each having concretely identified jurisdiction. If this approach is taken, it is usually necessary to create a third list of those tasks to be exercised concurrently.

Powers assigned to one particular level of government in a federation may be exclusive, that is, under the control of that level of government alone. However, to grant a power to one level of government is not necessarily to take it away from another. A normal feature of federal constitution-making has been the granting of implicitly or explicitly concurrent powers, exercisable by either or both levels of government. Logically, of course, this entails some procedure or rule for resolving the clashes that will inevitably arise when two levels of government have jurisdiction over the same policy fields—a **paramountcy provision** or supremacy clause. Other powers will be made, in explicit terms, the sole or exclusive jurisdiction of one level of government alone.

As federal design became more sophisticated over time, a further consideration was whether the lists of enumeration were **exhaustive** or merely **indicative** in nature. An exhaustive list gave a specific and limited grant to powers to the government in question, intended to constrain as much as to empower. Anything not on the list was out of bounds (*ultra vires*). An indicative list, by contrast, gave an open-ended grant of powers that intended to strengthen by enumerating specific examples. The difference was typically signalled by a covering clause indicating restrictiveness or, alternatively, indicating a plenary grant of power.

The Division of Powers in the Modern World

Modernization dramatically increased the ambiguities of power assignment according to principles of common or particular interest. Even such obviously national tasks as “external affairs” can have powerful local implications, depending on the nature of the external commitments entered into. Even half a century ago, Wheare was commenting that now “the subjects upon which treaties come to be made are manifold” and thus supply national governments with boundless opportunities for subverting the division of powers.⁷ Moreover, as central governments assumed a much wider range of responsibilities, any sense that the two levels of government could operate independently in their separate spheres evaporated. In the words of one federalism scholar, there has been a “centralizing trend” whereby the division of powers has gone from original “co-ordinate or

6 As pointed out in Stevenson, “Division of Powers,” 81.

7 Wheare, *Federal Government*, 170; also see Hans Michaelman (ed.), *Foreign Relations in Federal Countries* (Montreal: McGill-Queen’s University Press, 2008).

dual federalism," to "secondly co-operative federalism, and thirdly organic or integrated federalism."⁸

What has driven this trend is not simply an expansion of the role of central governments, but a number of developments that have reversed or fundamentally changed the basis on which the division of powers in these federations operates. Many functions that were once unambiguously local are now accepted as having an impact that goes well beyond the borders of any one jurisdiction. The US government's enormous policing agency, the Federal Bureau of Investigation (FBI), for instance, corresponds to no power given to Congress in the constitution but simply reflects the cross-jurisdictional realities of crime. Similarly, environmental protection was never envisaged as a national responsibility (or even a governmental responsibility at all) in the earlier federations, yet the spillover and adverse competition effects have brought about national environmental protection laws and agencies across the federal world. Perhaps most important, though, has been the transformation of redistributive social policy from an inherently local to an inherently national matter with the rise of the modern welfare state.⁹ In exchange, the subnational governments have become much more focused on local economic development, and the respective functions of the two levels of government have been effectively reversed.¹⁰ But this is not all. The original idea that federalism would allow different jurisdictions to practise different values has run up squarely against the modern world's commitment to universal human rights, whether that be in respect of racial issues, sexual choice, gender equality or a range of other subjects.

In some federal systems such as Germany, Switzerland, and India, the original constitutional design concentrated legislative responsibilities at the national level while assigning the tasks of policy implementation and administration to the subnational units. Essentially following the German model, the EU has gone in this direction as well. It is constructed on the basis of a common supranational policy framework, the implementation and administration of which is entirely left to the member states. Until the 2009 Treaty of Lisbon, the assignment of powers in enumerated lists was avoided altogether. And even after Lisbon, EU governance continues to rely primarily on the principle of subsidiarity as a political guideline for negotiated task assignment.

Overall, it would seem that the classical division of powers in the original legislative federations has given way to some degree of convergence between legislative and administrative federalism in more contemporary systems. A greater functional division of powers exists in those federations, with central

8 Geoffrey Sawer, *Modern Federalism* (London: C.A. Watts, 1969), 64.

9 As Wheare noted in *Federal Government*, 144.

10 Paul E. Peterson, *The Price of Federalism* (Washington, DC: Brookings Institution Press, 1995).

governments laying down broad policy frameworks in a range of areas that were previously exclusive responsibilities of the states or provinces, but with those governments retaining an important role in implementation and administration.

The American Experiment

In the constitution of 1789, the Americans pioneered a balance between national and subnational powers that marked the transition from confederal arrangements to modern federalism. Unsurprisingly, perhaps, its approach to the division of powers was minimalist. As we will see in Chapter 8, the framers assembled at the Philadelphia Convention were far more concerned about principles of representation than about how powers should be distributed between the two levels of government. There was little disagreement about what the new “general government” should be empowered to do and what the states would no longer be permitted to do. At the end of the eighteenth century, what we now call the modern age was just beginning, and the demands of government were limited. The result was a very short constitutional text. And since that text was very difficult to change (see Chapter 10), modernization required increasingly stretched judicial interpretations. Quite contrary to what the original designers had intended, those interpretations overwhelmingly strengthened the powers of Congress over the states.

Context

Being first, the Americans had little to work with or to learn from. The existing confederation clearly did not provide efficient tools of national governance. The examples of existing Old World confederations were rejected on similar grounds. And, as far as federalism was concerned, all they could draw from Montesquieu, their main source of intellectual inspiration in this regard, was the idea that some sort of federal arrangement was the most expedient means of sustaining republicanism over a large area.

The constitutional compromise as it took shape at the Philadelphia Convention had far more to do with contemporary realities than with lofty principles or historical precedent. While all agreed on the need for an adequately resourced central government, views among the gathered delegates differed greatly, ranging from those of unabashed centralists such as Alexander Hamilton, who would have been happy to abolish the states altogether, to those of unrepentant confederalists who feared central power usurpation at every turn.¹¹ In the end, both sides agreed upon a simple division of powers that delineated the scope of the new general government and identified a few areas where the states would have to forfeit jurisdiction.

¹¹ Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: University Press of Kansas, 1984), 214.

There was no doubt that the division of powers in the new republic would assume a legislative rather than an administrative form. Prior to modern means of transportation and communication, in a union of already considerable geographical expanse with some basic irreconcilable policy differences, a division of roles whereby the states had to implement and administer national legislation would have been entirely unworkable. Indeed, the issue never arose. The only precedent the framers could draw upon was substantive government as it had existed in the colonies and elsewhere. The question was which of these substantive powers should be granted to the new central government they were creating.

Assigning Powers

It takes only a cursory look at the specific powers granted to Congress to appreciate what was envisaged to be the appropriate role of the new general government. The powers listed in Section 8 of Article I are overwhelmingly concerned with either national defence or the common market. Thus contentious differences could be quarantined and traditionalists assuaged with all other functions of government left to the states. The list concludes with a general power to make laws “necessary and proper” to the fulfillment of those functions, but there is little doubt that Congress was being limited to what was effectively the minimal range of powers that would be necessary to make the federation work as a coherent military and economic force. Responsibilities of government absent from this list and thus beyond the jurisdiction of Congress include civil and criminal law, policing and penitentiaries, transportation and communications, industry and commerce within state borders, public services, water- and land-use regulation, health care, education, and social welfare.

Not only was the range of powers being granted to Congress very limited, but it was also by no means granted exclusively. The explicit listing in Section 10 of a handful of powers being withdrawn from the states—notably the power to impose import tariffs and the power to enter into treaties—implies quite clearly that the grant of a power to Congress was not a complete “withdrawal” of that power from the states; the enumerated powers under Section 8 were meant to be concurrent unless otherwise indicated.

At the time, dispute did not arise primarily over the assignment of powers itself but instead over the way in which Congress would be able to exercise them. Fearing that their trade concerns would be swamped, Southern delegates insisted that foreign treaties and commercial regulations would have to be approved by a two-thirds majority in the Senate. In the end, they prevailed on the issue of foreign treaties, but not on that of commerce.

Enumerating Powers: The Single List Approach

Without a great deal of debate, the delegates to the Philadelphia Convention settled on a “less is best” approach to setting the division of powers down on

Box 6.1 The Main Powers of Congress in the American Single-List Approach**Article I, Section 8:**

- "The Congress shall have Power to lay and collect tax . . . to . . . provide for the common defence and general welfare of the United States."
- "To coin money."
- "To regulate Commerce with foreign Nations and among the several States."
- "To establish Post Offices and post Roads."
- "To sign treaties, raise a military force, and declare war."

paper. Although there are three sections dealing with the assignment of powers in the US Constitution—sections 8, 9, and 10 of Article I—the approach chosen was that of a **single list**. The specific national responsibilities indicated in Box 6.1 were enumerated, and the US Constitution has little more to say about the division of powers than this. Nothing whatsoever was said about the powers of the states. This simplicity accounts in part for the US Constitution's great ambiguity, which, as we will see in Chapter 11, opened the door to the increasing judicialization and centralization of the American federal system.

The single list approach signalled that the enumeration of congressional powers was to be exhaustive and limiting. The silence on state powers indicated that states should retain the plenary power. The states were thus granted implicit and open-ended residual powers of everything that was not explicitly taken away from them. As Madison put it when trying to sell the new constitution to skeptics, the powers granted to Congress "are few and defined. Those that remain to the state governments, are numerous and indefinite."¹²

The *Articles of Confederation* had given residual powers to the states explicitly, as their right of sovereignty over every power not expressly "delegated" to Congress.¹³ However, the new constitution omitted any such guarantee. This was apparently rectified by the passage and ratification of the first ten amendments immediately after the constitution came into effect. The Tenth Amendment containing the residual power clause was what Thomas Jefferson regarded as "the foundation of the Constitution."¹⁴ However, it did so in more moderate language, and the constitution no longer affirmed the sovereignty of the states, as must be expected with the transition from confederal to federal union.

¹² *Federalist* 45: "Alleged Danger from the Powers of the Union to the State Governments Considered."

¹³ Contrary to what the choice of words might suggest, these are not "delegated" powers—that is powers granted on a revocable basis to a constitutionally subordinate body or individual—but rather assigned powers.

¹⁴ Forrest McDonald, *States' Rights and the Union: Imperium in Imperio, 1776–1876* (Lawrence: University Press of Kansas, 2000), 24.

Developments

Nobody at the time would seriously quarrel with this general approach, but those whose primary concern was the creation of a strong central government did manage to slip in two additional provisions that would later empower Congress to assume just about any power it wanted or considered essential in the national interest. One was the **necessary-and-proper clause** of section 8, which the Anti-Federalists argued in campaigning against ratification “amounted to an unlimited grant of power to Congress.”¹⁵ Congress, it declared, shall have the power “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” While to the Anti-Federalists this represented a gutting of the constitution’s federal principles, to Madison it was merely a statement of the obvious: the enumerated powers entail various component and related powers if they are to be meaningful. Either a futile attempt could be made to enumerate all those possible subordinate powers, or an equally futile attempt could be made to pretend that Congress would not call upon them.¹⁶ The other centralizing feature was the **supremacy clause** of Article VI, which established the paramountcy of national over state laws: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . .” This was the substitute for a national veto power over state laws that Madison had sought.¹⁷ Invoking this provision, the US government has been able to engage in the widespread **pre-emption** of state legislative authority (see Chapter 9).

These two provisions have played an important role in the great centralization of power that has occurred in American federalism over the past two centuries. However, the general welfare clause and the commerce clause have also been integral to that process. When the US Constitution was drafted, there was little reason for the states to trade with each other, businesses were overwhelmingly local in extent, and thus “Commerce . . . among the several states” was minimal.¹⁸ That situation has changed fundamentally, and with it the significance of the commerce clause. As we will see in Chapter 11, judicial interpretation played havoc with the original design, and the restrictive intentions of limiting the general government to a few

15 McDonald, *Novus Ordo Seclorum*, 267.

16 *Federalist* 44.

17 David Brian Robertson, *The Original Compromise: What the Framers Were Really Thinking* (New York: Oxford University Press, 2013), 168.

18 Edmund W. Kitch, “Regulation and the American Common Market,” in A. Dan Tarlock (ed.), *Regulation, Federalism, and Interstate Commerce* (Cambridge, MA: Oelgeschlager, Gunn & Hain, 1981), 7–56.

clearly enumerated powers proved ineffective. On the basis of a small range of enumerated powers, Congress could reign supreme by means of the implied or incidental powers flowing from these clauses.

Canada: Centralist Intentions

After the Swiss Constitution of 1848 (discussed below), the next federal constitution to be enacted was the *British North America Act* (*BNA Act*) of 1867. Like their American predecessors, the Canadian framers spent far more time on the issue of representation than on the division of powers.¹⁹ Also as in the American case, there was little disagreement about how powers ought to be divided. However, the *BNA Act* was crafted under very different conditions. The already existing American precedent was very much on the minds of Canada's founding fathers. And while judicial interpretation did not exactly play havoc with their centralist intentions, it nevertheless helped to move the balance of powers in the opposite direction (see Chapter 11 again).

Context

Even more than their American predecessors, the Canadians who set out to unite Britain's remaining North American colonies had to accommodate strong regional differences within the federal structure they were designing. And as we saw in Chapter 5, they had to do so while in danger from a powerful and sometimes threatening neighbour. By contrast with the US experience, they were moving down an existing track. It is not difficult to imagine how Canadians in the 1860s might have looked upon the bloody civil war raging to their south and come to the conclusion that any constitution that allowed decentralization to become secession was ill-designed.

Given the deep divisions between English and French as well as between political conservatives and radicals in either camp—not to mention the worries of the Maritime provinces whose plans for a separate union were hijacked by the Canadians—there is something almost astonishing about the relative ease with which all agreed in the end to a rather centralized formula for allocating powers. There was, of course, no long-standing tradition of autonomy and self-government comparable to the New England colonies.

The main protagonists were John A. Macdonald (1815–91) and Georges-Étienne Cartier (1814–73), conservative leaders in English and French Canada, respectively. Macdonald preferred a unitary regime but had to settle for what he intended to be a powerfully centralist federation. Cartier saw federalism as the best possible compromise guaranteeing the survival of French language and

19 Jennifer Smith, "Canadian Confederation and the Influence of American Federalism," *Canadian Journal of Political Science* 21.3 (1988): 443–64.

culture in North America. In the end, both the modernizer and the traditionalist got what they bargained for—at least on paper.²⁰

Centralist Provisions

Macdonald was satisfied with the constitutional scheme because it included a number of overtly centralist elements—so overtly centralist, in fact, that some commentators doubted whether Canada quite qualified as a federation at all. One of these was the status of the vice-regal provincial heads of state (the lieutenant-governors) as deputies of the Canadian head of state (the governor-general) rather than agents of the British Crown—and thus acting on advice from the prime minister rather than the provincial premiers. Another was provision for disallowance of provincial legislation by the governor-general—and hence by the prime minister again, on whose advice the governor-general would be acting. Contrary to Macdonald's expectations, though, these provisions fell into disuse and thereby effectively became a dead letter. Any impact these features might have had has been overwhelmed by the design and interpretation of the division of powers.

Assigning Powers

At its core, the result was not much different from the assignment of powers in the US Constitution.²¹ The Dominion government was in charge of external security and the common market. As in the US Constitution, no public services or land-use powers were included. There were some divergences, however, with parliament being granted power to legislate in the areas of criminal law and marriage, powers exclusive to the states in the US Constitution. The provinces retained power over traditionally local matters such as health, social welfare, and education. This was to be a legislative federation in that each level of government carried out its respective tasks all the way from legislation to implementation and administration. One partial exception to this was the plan for the judicial system: the law would be national, but its administration would be provincial.

In contrast to the American design, the *BNA Act* made the bulk of assigned powers exclusive to the level of government concerned, and when it made them concurrent, it did so explicitly. It was silent, however, on the question of which level of government would exercise paramountcy in cases of overlap or dispute—a curious omission given the strong desire to forge a highly centralized union. A number of rather idiosyncratic provisions also found their way into the *BNA Act* that would obscure original intentions and open the door to judicial redirection almost from the beginning.

20 See Robert C. Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: State University of New York Press, 1991), 15–45.

21 See Richard Simeon and Ian Robinson, *State, Society, and the Development of Canadian Federalism* (Toronto: University of Toronto Press, 1990), 19–30.

Most important among these, in an unforeseen way, was the provision that gave the provinces control over public lands. In particular, they could manage and sell the timber on these lands, one of the most valuable resources at the time. The provinces also owned the rights to all other natural resources, although this was hidden in the *Act's* provisions about revenues, assets, taxation, and debts and moved only in 1982 into the section dealing with the division of powers. Ostensibly, these provisions were contradicted by the Dominion government's broad power over the "regulation of trade and commerce." Whereas the US Constitution qualified this grant of power by restricting its application to international and interstate commerce, the *BNA Act* made no such concession to provincial autonomy. Judicial interpretation later rectified the situation. Alongside the cultural divide between English and French Canada, the provincial ownership of natural resources undermined the original intention of creating a centralized union.

Enumerating Powers: The Multiple-Lists Approach

The Canadians clearly wanted to do the exact opposite of what the Americans had done. Instead of enumerating central government powers in a restrictive list and leaving the broad residue to the provinces, they wrote a lengthy list of provincial tasks and left residual powers to parliament (see Box 6.2). The premise underlying this was nonetheless exactly that of the Americans: the government with the residual powers is the government with the whip hand. And as in the American case, this proved illusory.

However, the Canadians had second thoughts about this reverse single-list approach and decided to add a lengthy list of enumerated national powers just in case. This second list was meant to illustrate national powers in some kind of indicative or "declaratory" fashion, and in its opening and closing paragraphs the clause is quite unambiguous in this respect. As we will discuss in Chapter 11,

Box 6.2 The Original Division of Powers in the Canadian Constitution

- Section 91 was drafted with a powerful peace, order, and good government (POGG) covering clause and then the declaratory list of the original 29 exclusive powers of parliament. The most important of these pertain to national defence and the common market, including "any mode" of taxation and regulation of trade and commerce. It also contains responsibility for "Indians" and their reserved lands.
- Section 92 listed 16 exclusive provincial powers, including those pertaining to provincial lands, property and civil rights, and "direct" taxation.
- Section 93 specified the provincial power over education.
- Section 95 listed agriculture and immigration as concurrent powers.
- Section 109 assigned to the provinces the ownership of lands, resources, and royalties.

though, there was no guarantee that this is how the clause would be interpreted by the courts. The dual-list approach thus became an exercise in drafting multiple lists. Not only was education put into a different section from the other provincial powers, but yet another section specified concurrent or shared powers—which at the time included only agriculture and immigration. And finally, there were hidden clauses pertaining to the division of powers in some other sections as well.

All in all, the Canadian attempt to enumerate powers in a way that would bring clarity to the exercise of divided powers was not very successful. Given the country's bicultural nature, the intention of making Canada a strongly centralized federal system was probably doomed under any scheme of dividing powers. Moreover, fixed on the idea of forging a national market economy, the framers did not foresee the importance of natural resources as a main source of provincial might.

Developments

Also not foreseen—and even more problematic—was the juxtaposition of a general clause that empowered parliament to make all laws deemed necessary for “peace, order, and good government” (POGG), with the stipulation that the provinces would retain power over “property and civil rights.” The POGG clause was meant to reinforce the superiority of the central government by giving it residual powers. The property and civil rights clause in turn was a relic from the 1791 *Constitution Act* that had created Upper and Lower Canada. Its original purpose was to allow the growing numbers of post-revolutionary Loyalists streaming into Canada from the United States to set up their own British model colony instead of having to adopt French civil law and the peculiarities of seigneurial land tenure. It now took on a reverse dynamic, protecting the differences of French civil law in Québec. But its broad stipulation could be—and as we will see in Chapter 11, *would be*—construed as an empowerment for all provinces to regulate all matters falling under civil law, including all aspects of economic policy and regulation within provincial boundaries.

Yet while judicial interpretation of the necessary-and-proper, supremacy, and other general clauses clearly defeated almost any notion of residual rights in the American case, the POGG clause did not triumph over property and civil rights. Judicial interpretation overall remained more balanced. Furthermore, important jurisdictional disputes over welfare modernization were settled as much by inter-governmental agreement as by the courts (see Chapter 9).

Germany: The Administrative Model

As we have noted in earlier chapters, Germany is an interesting case in which dramatic historical discontinuities mask a powerful underlying set of continuities. * Bismarck's imperial constitution of 1871 was replaced by the republican Weimar

Constitution in 1919; after the unconstitutional dictatorship of the Nazis, yet another constitution was drafted in 1949, the West German "Basic Law." Yet in its essential design with regard to both dual representation and the division of powers, German federalism did not change fundamentally through all those upheavals.

A comparison with Canada may provide an explanatory clue to this continuity of the German federal design. In Canada, the dominant political tradition was a parliamentary one, and federalism was added, reluctantly, as a necessary compromise in order to achieve modern statehood. For Germany, one can make exactly the reverse argument. Federalism, understood as a form of negotiated political accommodation among a plurality of territorial powers, had been a constant tradition since the Middle Ages. The forces of change, on the other hand, came from the gradual and reluctant adoption of parliamentary democracy.

In order to understand the pattern of the division of powers in German federalism, we need to take a contextual look at both the Bismarck Constitution, with its peculiar accommodation of dynastic powers, and at the reconstruction of German federalism in the constitutional design of 1949. The Weimar Constitution of 1919–33 can largely be disregarded. While many of its formulations foreshadowed those of the current Basic Law, its main emphasis was on parliamentary democracy at the expense of the legislative and financial autonomy of the *Länder*.

The cornerstones of the German federal model, in essence maintained throughout its various reincarnations, have always remained the same. In order to bring about a quasi-unitary system of public services and administration, legislative powers were concentrated at the centre. As a compensation for this loss of autonomous legislative powers, the *Länder* governments not only gained a right to co-determine national legislation through their membership in the second chamber of the national legislature, they were also assigned responsibility for implementing and administering most of those laws and policies.

Context

As we saw in Chapter 5, the Second Reich of 1871 established German unity under Prussian hegemony. Bismarck, the Prussian mastermind, played a double game. On the one hand, he wanted unity for the purposes of economic modernization as much as for an unchallenged position of power in Europe. On the other hand, he wanted to conserve the existing social order and protect it against the rising tides of liberalism or, even worse, socialism. As we also saw in Chapter 5, unification occurred via federalism because the German states and territories already had an established existence and structure of government, as well as for reasons of ideology and cultural tradition. Notions and practices of federalism had enjoyed a long tradition in Germany, and as Bismarck understood full well, such path-dependent continuity served his goals better than would path-breaking upheaval with unforeseeable consequences.

The outcome, then—Bismarck's imperial constitution of 1871—effectively established the modern contours of German integrated and administrative federalism. The German federal compromise was that the territorial princes were “compensated” for the loss of legislative competences by leaving to them the tasks of implementation and administration.²² Most laws were now made in Berlin, under Prussian dominance to be sure, but in most cases only after diplomatic consultation and direct cooperation with the ministers of the *Länder*. The *Bundesrat*, established as the upper chamber in the new bicameral national legislature, essentially functioned as a “clearinghouse” for intergovernmental coordination and ratification.²³ The *Länder*, then, were relatively autonomous in implementing and administering these laws as they saw fit. Thus, cultural identities in the *Länder* were preserved along with the loyalty of grateful subjects.

The architects of the postwar constitution were 65 deputies elected by the newly established *Länder* legislatures. They already had before them a draft with general guidelines submitted by a constitutional convention of experts called together by the *ministerpräsidenten* (premiers) of the *Länder*. The division of powers resulting from these two rounds of deliberations was guided by a general consensus—notwithstanding opposition from the occupying powers—in favour of centralization.²⁴ The new national government was to have the necessary legislative powers to provide equal if not uniform living conditions for all citizens. At the same time, however, it should never again be allowed to follow the Nazi path of unbridled centralization of power. For instance, there would not be a national police force. For the same reason, if not by default, the federal system would restore the traditional pattern of dividing powers whereby the *Länder* retained the powers of policy implementation and administration.

Assigning and Enumerating Powers

There are great limits to the extent to which German federalism can be categorized according to the framework we have applied to the division of powers in the American and Canadian constitutions. Indeed, one may argue that the combination of integrated and administrative federalism under the Basic Law was intentionally aimed at **interlocking** rather than dividing powers.

22 Gerhard Lehmbruch, *Parteienwettbewerb im Bundesstaat: Regelsysteme und Spannungslagen im Politischen System der Bundesrepublik Deutschland* (1976; Wiesbaden: Westdeutscher Verlag, 2000), 60.

23 Lehmbruch, *Parteienwettbewerb im Bundesstaat*, 64.

24 John Ford Golay, *The Founding of the Federal Republic of Germany* (Chicago: University of Chicago Press, 1958), 58–60.

That intention can be read from a number of generally programmatic stipulations: the administrative character of the federal system found expression in Article 30, according to which the *Länder* exercise "public powers" and discharge "public functions"; paramountcy was assigned to the federal level under Article 31: "federal law shall prevail over *Land* law"; and the *Länder* were nevertheless given residual powers in all matters not assigned to the federal level (Article 70). As we will discover shortly, this last stipulation was somewhat misleading—not only because a general clause in favour of central legislation would sideline it over time as in the American case, but also because of how the allocation of powers itself was framed.

At first glance, power division in the Basic Law appears to have been constructed conventionally with a double-list enumeration: first a list of exclusive federal powers in Article 73, followed by a list of concurrent powers in Article 74. However, these two lists were qualified by a number of complicating provisions: according to Article 71, the *Länder* could not legislate in areas of exclusive federal power unless authorized by a federal law; according to Article 72(1), they could legislate in the concurrent field only if legislation pertaining to the particular policy field in question was not pre-empted by federal legislation; according to Article 72(2), the federation in turn had the right to such pre-emptive legislation if this was deemed necessary for the establishment of equal living conditions, as well as for legal or economic unity in the national interest; and finally, Article 75 assigned a third list of policy fields to so-called framework legislation, according to which federal legislation would determine general guidelines and policy goals but had to leave to the *Länder* subsequent legislation detailing implementation and execution. Taken together, these stipulations underscore the German tradition of administrative federalism whereby the allocation of powers is based on the idea of complementary roles. National legislation is to establish the general policy and program objectives, the implementation and administration of which are to be left to the *Länder*.

Constitutional changes in 1969 broke this pattern by adding the so-called **joint tasks** (Article 91a). Heeding calls for a more organized form of cooperative federalism at the time, it was deemed necessary to create joint responsibilities in areas such as postsecondary education, economic and agricultural restructuring, and coastal protection. These joint tasks went beyond the complementary nature of concurrent powers in that they required negotiated program agreements, including a fixed formula of cost-sharing. The allocation of powers in the German federal system looked ever more like a system of intergovernmental policy entanglement.

Reforms

The Allied observers looking over the shoulders of the West German constitution makers in 1949 had already complained that in particular the necessity

clause of Article 72(2), would lead to an undue “unitarization” of the West German federal state.²⁵ And indeed, if there originally was an intended legislative balance in the federal system, it was drastically hollowed out over time as national legislators justified their pre-emptive legislative strikes in the name of unity and equity. The list of concurrent powers was progressively extended to encompass a wide range of major policy fields, and as the national government became active in virtually all of them, the *Länder* were systematically reduced to the status of administrative adjuncts. In essence, the only policy fields left to the *Länder* were culture, education, and police—and even there encroachment was facilitated by the Basic Law’s emphasis on concurrency and framework legislation. Even though Article 75 established authority to pass such framework legislation for a specific number of fields, one can see the same principle at work with regard to the much larger catalogue of concurrent powers in Article 74.

Discontent with this imbalance did not arise so much over the degree of centralization—or, in German parlance, “unitarization”—but over the resulting policy entanglement, increasingly criticized as a “decision trap” for efficient policy-making.²⁶ The main thrust of the critique focused on the *Bundesrat*, where the *Länder* had co-determination rights over most national legislation. This was seen as dysfunctional—particularly when opposing party majorities governed the two legislative chambers.

But beginning in the late 1980s, the critique increasingly focused on the allocation of powers itself, and on the erosion of legislative *Länder* autonomy that had occurred over time.²⁷ One reason for this was that the old “compensation” formula of German federalism no longer worked, as the *Länder* increasingly had to implement European law over which they did not have co-determination control; another reason was the enormous financial and equalization costs of reunification (see Chapter 7), which led to calls for more autonomy on the part of some of the richer *Länder*; a final and related reason was the demand for a more market-like “competitive federalism” that logically would require substantive decentralization.

25 This and the following have been adapted from Heinz Laufer and Ursula Münch, *Das föderative System der Bundesrepublik Deutschland* (Opladen: Leske + Budrich, 1998), 129–30.

26 The classical critique is Fritz W. Scharpf, “The Joint-Decision Trap: Lessons from German Federalism and European Integration,” *Public Administration* 66.3 (1988): 239–78; cf. Katrin Auel, “Between Reformstau and *Länder* Strangulation? German Co-operative Federalism Re-considered,” *Regional and Federal Studies* 20.2 (2010): 229–49.

27 The following is succinctly summarized in Fritz W. Scharpf, *Föderalismusreform: Kein Ausweg aus der Politikverflechtungsfalle?* (Frankfurt: Campus, 2009), 58–59. See, alternatively, Arthur B. Gunlicks, “Reforming German Federalism,” in Gabrielle Appleby, Nicholas Aroney, and Thomas John (eds.), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2012), 115–40.

Discontent and critique led to a series of constitutional reforms. The first of these had to do with the role of the *Länder* in the European Union. In principle, foreign affairs are an exclusive responsibility of the national government. Article 32 of the 1949 Basic Law had already modified this, allowing the *Länder* to enter into international treaties in matters of their own jurisdiction and with the approval of the federal government. The same rationale led the *Länder* to demand more direct participation in any European policy-making that had regulatory impact upon member-state citizens. In conjunction with the Maastricht Treaty, which established the EU in 1993, therefore, a new Article 23 was inserted into the Basic Law. It provides for varying modes of *Länder* consultation and participation, mostly via the *Bundesrat*, in the European policy-making process, depending on the degree to which *Länder* jurisdiction is affected by such policy-making.

A second round of constitutional reforms was undertaken in 1994 when the language of the necessity clause in Article 72(2) was tightened: federal legislation, now *explicitly* linked to the concurrency field, was allowed only to the extent that it was required for the establishment of equitable living conditions or the maintenance of legal and economic unity throughout the federation. More importantly, a new provision under Article 93(2a) allowed litigation before the Federal Constitutional Court. When it came to litigation ten years later, in 2004, the court tightened the reach of the necessity clause much more dramatically by expressly stating that federal legislation could only correct already existing inequality and disunity resulting from diverse *Länder* legislation, but could no longer proactively prevent it.²⁸

Like a bombshell, this court decision exploded into a third attempt at constitutional reform already under way because it could potentially lead to questioning the constitutionality of the entire past and present body of federal legislation under the concurrency provision of Article 74. But it also compelled the inter-governmental combatants in the constitutional reform commission to bargain a way out of the dilemma.²⁹ The work of the commission itself nevertheless ended in deadlock and failure. But after a snap election in 2005, which led to a grand coalition government of the two main parties at the federal level, a compromise was finally reached and the reform package was passed in 2006 by the required two-thirds majorities in both chambers.

The outcome effectively established three different categories of concurrent powers (see Box 6.3): first, Article 72(2) now singles out 10 of 33 concurrent policy fields to which the restrictive interpretation of necessity applies; this means, second, that pre-emptive federal legislation as before will not be challenged in the remaining fields; and third, Article 72(3) identifies six policy fields in which the *Länder* may legislate in deviation from existing federal law. In

28 Scharpf, *Föderalismusreform*, 95.

29 Scharpf, *Föderalismusreform*, 93–110.

Box 6.3 Division of Powers in the German Constitution

- Article 23: Consultative and participatory rights of the *Länder* in European Union matters.
- Article 30: Administrative federalism: the execution of public-service tasks is assigned to the *Länder*.
- Article 31: The paramountcy provision: national laws override *Länder* laws.
- Article 70: Residual powers to the *Länder*.
- Article 71: Possibility of delegating exclusive federal powers to the *Länder* by federal law.
- Article 72: Concurrency provisions: (1) the *Länder* can legislate only if pre-emptive federal law has not been enacted; (2) in 11 policy fields, including the regulation of civil and commercial law, such federal legislation falls under the restrictive necessity clause.
- Article 73: List of 17 exclusive national powers, including security, monetary system, customs, and trade regulation.
- Article 74: List of 32 concurrent powers, including immigration and refugees, labour law, and scientific research.
- Article 83: *Länder* administration of national legislation as an autonomous task.
- Article 91a: Joint tasks regarding improvement of regional economic restructuring, agricultural restructuring, and coastal protection.
- Article 91b–e: Intergovernmental cooperation in the fields of educational planning, scientific research, information technology, administrative benchmarking, and support for persons seeking employment.

addition, postsecondary education (university construction and education planning) was removed from the list of joint tasks and handed back to the *Länder*, along with a number of other relatively minor policy fields.

This outcome did not dramatically change the face of German federalism, nor did it radically differ from the conventional assignment of powers in other federations.³⁰ The policy fields singled out for scrutiny under the necessity clause of Article 72(2) for the most part are those in which the *Länder* have traditionally had particular interests, and the others, falling under the provision of Article 72(1), are mostly those where uniform regulation is also in the *Länder* interest. Only because the outcome on balance tilted in the direction of decentralization can the 2006 reforms be appreciated as a modest turnabout in German federalism.³¹ But it would be a mistake to judge this outcome in conventional

30 See Julia von Blumenthal, "Towards a New German Federalism? How the 2006 Constitutional Reform Did (Not) Change the Dynamics of the Federal System," in Silvia Bolgherini and Florian Grotz (eds.), *Germany after the Grand Coalition: Governance and Politics in a Turbulent Environment* (Basingstoke, UK: Macmillan, 2010), 31–48.

31 Arthur Benz and Jörg Broschek, "Germany: Federalism under Unitary Pressure," in John Loughlin, John Kincaid, and Wilfried Swenden (eds.), *Routledge Handbook of Regionalism and Federalism* (Abingdon, UK: Routledge, 2013), 231–32.

terms as a move toward a more legislative division of powers. Contrary to the British settler federations discussed previously, the key division is not between policy *fields* but between policy *roles*. With a few more exceptions, policies are still predominantly made nationally, and all are implemented locally. This basic approach is laid down in Article 83: "The *Länder* shall execute federal law as a matter of their own concern in so far as this constitution does not otherwise provide or permit." In the context of German administrative federalism, the 2006 reforms almost inevitably had to end with ever more detailed and complicated regulations, rather than with the disentanglement of powers.³²

Subsidiarity in the EU

Complicated regulation is also the name of the game in the EU, which fits even less into conventional patterns of power allocation. Since it was initially conceived as a treaty-based common market among the six original member states and relied predominantly on unanimous agreement, the question of allocating powers was not an issue in what was eventually called the European Community. It became an issue only over time, when subsequent treaty changes assigned more and more policy areas to common regulation, and efficient governance among an ever-growing number of member states required that decisions be made by weighted or qualified majority voting (QMV).³³ The decisive turning point came with the *Single European Act* (SEA) of 1987 and the Maastricht Treaty, or Treaty on European Union (TEU), of 1993.

In some regards, the EU's experience with the division of powers has not been unlike that of more classic federations. Since union was driven by a desire to gain the benefits of a single market, the first powers assigned to the EU were those concerning the regulation of that market. As with the classic federations, matters to do with social policy were left to the constituent units. Here, though, there is a very big difference in that the EU's constituent units already had their own, large, well-established, and individually distinctive welfare states in place while the classic federations were formed before the welfare-state era. Under the Treaties, the EU has a very small number of exclusive powers, an extensive range of concurrent powers, and a large area where it has so far not been given licence to act.³⁴ The EU's experience deviates from that classic experience in the confederal way that monetary policy remained for a long time under

³² Arthur Benz, "From Joint Decision Traps to Over-Regulated Federalism: Adverse Effects of a Successful Constitutional Reform," *German Politics* 17.4 (2008): 440–56.

³³ The transition from unanimity to QMV was actually foreseen in the original Treaties but delayed due to France's opposition.

³⁴ Alex Warleigh-Lack and Ralf Drachenberg, "Policy-Making in the European Union," in Michelle Cini and Nieves Pérez-Solórzano Borragán (eds.), *European Union Politics*, 4th ed. (Oxford: Oxford University Press, 2013), 201.

member-state control, while fiscal policy (see Chapter 7), foreign policy, and the military still remain under such control.³⁵

As the functionalist theory that we noted in Chapter 5 would predict, the EU has often been driven to expand its remit in areas that had implications for the common market: "The most important reason for the introduction of a common environmental policy," for instance, "was the fear that trade barriers and competitive distortions in the Common Market could emerge due to the different environmental standards."³⁶ A second major impetus in fields such as environmental policy has been the classic subject matter of federal theory: inter-jurisdictional spillovers.³⁷ All federations have had to adjust to the reality that pollution often does not respect borders. Similar processes have been at work in other fields such as health policy.³⁸

The result, both intentional and unintentional, is a pervasive concurrency.³⁹ In the classic federations, concurrency has often been a stalking horse for central government takeover; to guard against this, the EU has made the concept of subsidiarity its operating rule. In regard to the extensive areas where the EU has not been granted competence, meanwhile, pressures to take a leadership or instigating role have led to the development of new techniques of "soft law," notably the **Open Method of Co-ordination** (OMC), whereby the EU coordinates processes of performance comparison and inter-jurisdictional learning otherwise known as **benchmarking**.⁴⁰ Advocates of this celebrate it as a new form of "experimentalist governance."⁴¹

The Subsidiarity Solution

Until the *Single European Act*, the assumption about power allocation simply was that the Community could act in any area covered as a common policy

35 This created significant challenges for the EU in its attempt to be an international actor. Robert Dover, "The EU's Foreign, Security, and Defence Policies," in Michelle Cini and Nieves Pérez-Solórzano Borragán (eds.), *European Union Politics*, 4th ed. (Oxford: Oxford University Press, 2013), 240–53.

36 Christoph Knill and Duncan Liefnerink, "The Establishment of EU Environmental Policy," in Andrew Jordan and Camilla Adelle (eds.), *Environmental Policy in the EU: Actors, Institutions and Processes*, 3rd ed. (Abingdon, UK: Routledge, 2013), 14.

37 Knill and Liefnerink, "EU Environmental Policy," 14.

38 Scott L. Greer, "Uninvited Europeanization: Neofunctionalism and the EU in Health Policy," *Journal of European Public Policy* 13.1 (2006): 134–52.

39 Robert Schutze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (New York: Oxford University Press, 2009).

40 Warleigh-Lack and Drachenberg, "Policy-Making," 206–10.

41 For example: Charles F. Sabel and Jonathan Zeitlin (eds.), *Experimentalist Governance in the European Union: Towards a New Architecture* (New York: Oxford University Press, 2010); also see Wolfgang Kerber and Martina Eckardt, "Policy Learning in Europe: The Open Method of Co-ordination and Laboratory Federalism," *Journal of European Public Policy* 14.2 (2007): 227–47.

objective under the Treaties, and that agreement would prevail since most objectives were related to market integration. By extending the Common Market from a commercial trade market to the free movement of goods, services, persons, and capital, however, the SEA opened up questions of economic and social “cohesion” and thus touched upon policy areas in which the member states had much more sharply divided positions. Moreover, as it quickly became clear, such a fully integrated single market would logically have to lead to the convergence of economic and industrial policy, to monetary union, and to the eventual introduction of a common currency.

This was the agenda of negotiations leading up to the Maastricht Treaty. But what set off the alarm bells was the prospect of all these extended powers coming increasingly under a QMV rather than unanimity rule, thus turning the EU into a truly supranational (and hence federal) decision-maker. Looking at the United States as the most familiar model, “Euroscptics” feared that European federalism would eventually mean European supremacy over the member states, who would lose their sovereignty to the bureaucracy in Brussels. In order to assuage these fears, the designers of the Maastricht Treaty had to come up with something that would spell out limits to legislative and regulatory centralization. The result was subsidiarity.

As eventually laid down in Article 3b of the Maastricht Treaty,⁴² the principle of subsidiarity states that “the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states and can therefore, by reason of the scale or the effects of the proposed action, be better achieved by the Community,” and that “any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.” Moreover, the Preamble of the Treaty contains the general and rather Althusian affirmation (see Chapter 4) that the EU should be governed in such a way as to ensure that “decisions are taken as closely as possible to the citizen.”

From Subsidiarity to Enumeration and Back

Opt-outs from certain provisions by individual member states probably played a more significant role in the eventual ratification of the Maastricht Treaty than did these programmatic rather than legally binding stipulations of subsidiarity.⁴³

42 This was later modified as Article 5(3) TEU; see below.

43 For example, the UK was allowed to opt out from the so-called Social Chapter establishing minimum social conditions throughout the EU; see David Phinnemore, “The European Union: Establishment and Development,” in Michelle Cini and Nieves Pérez-Solórzano Borragán (eds.), *European Union Politics*, 4th ed. (Oxford: Oxford University Press, 2013), 30–31.

Against considerable skepticism from scholars as well as practitioners,⁴⁴ however, subsidiarity slowly but steadily established itself as the centrepiece of EU federalism. For the time being, however, the *Protocol on the Application of the Principles of Subsidiarity and Proportionality* appended to the Amsterdam Treaty in 1997 only provided further declarations of intent: in the spirit of subsidiarity, all Union action should remain “as simple as possible,” and all Union legislation should provide “framework directives” rather than “detailed measures” (Article 6). Yet only three years later, in his famous *Quo Vadis Europa* speech, the German foreign minister Joschka Fischer, musing about the “finality” of European integration, called subsidiarity the constitutional linchpin of a European federation in which sovereignty would be divided between Europe and its nation-states.⁴⁵

Fischer’s speech provided the impetus for the ill-fated attempt at replacing the European treaty framework with a constitutional document (see Chapter 5). In line with the conventional understanding of what a constitution should entail, that document also contained a multiple-list enumeration of powers that has now been taken over into the TEU by the Lisbon Treaty: an “exclusive” list containing the powers already exercised by the Union, such as commercial and monetary policy (Article 3); a much longer list of “shared” powers in policy fields predominantly still in the process of further integration, such as cohesion, agriculture, and the environment (Article 4); the assignment of the member states’ economic and employment policies to “coordination” under Union guidelines (Article 5); and a small list of broad policy areas such as industry, culture, and education where the Union shall “support, coordinate or supplement” member state action (Article 6).

In addition, Article 2(1) stipulates that the member states can legislate in the area of exclusive Union powers “if so empowered by the Union or for the implementation of Union acts,” and Article 2(2) defines the range of member-state legislation “to the extent” that the Union has not exercised it. Together with the guideline and coordination provisions of Articles 5 and 6, the affinity of these stipulations to the German model of framework legislation and administrative federalism is clearly apparent. Where the post-Lisbon EU departs from the German model, however, is that the entire body of enumerated powers explicitly remains tied to the principle of subsidiarity. While Article 5(3) of the TEU confines Union legislation in the concurrent field to the limits that had already been established in Article 3b of the Maastricht Treaty (see above), Article 5(1) now flatly states that the use of Union powers in their entirety—that is, including exclusive powers—is “governed by the principles of subsidiarity and proportionality.”

44 See John Peterson, “Subsidiarity: A Definition to Suit Any Vision?,” *Parliamentary Affairs* 47.1 (1990), 117–32.

45 Joschka Fischer, *From Confederacy to Federation: Thoughts on the Finality of European Integration* (Berlin: Auswärtiges Amt, 2000).

What Exactly Is Subsidiarity?

The idea of subsidiarity was first thrown into the Maastricht debate because of fears about the creation of a European “superstate.” It was essentially promoted by Jacques Delors, then-president of the European Commission, as an antidote to these fears. Delors was a personalist (see Chapter 4), socialist, and Catholic. Although the intellectual origins of subsidiarity are often seen as lying in Catholic social doctrine,⁴⁶ Delors’s research team at the Commission established that its intellectual origins were much older and could indeed be traced back to Althusius.⁴⁷ Subsidiarity could thus command much broader historical legitimacy. Giuliano Amato, a former Italian prime minister and the vice-president of the European constitutional convention, later conjured up the name of Althusius no fewer than four times during a speech describing the European project of federalism as a “pluralistic system” in which “no one . . . is the exclusive holder of public authority.”⁴⁸

In its current Lisbon reconfiguration, however, subsidiarity has gone well beyond Althusian incantations of plural governance close to the citizens. In fact, it is no longer just subsidiarity that determines the scope and dimension of European governance, but also the triad of conferral, subsidiarity, and proportionality. As defined in Article 5(2) TEU, **conferral** simply means that all Union action is limited to treaty objectives and can be interpreted as a residual clause in favour of the member states. As defined by Article 5(4) TEU, **proportionality** limits such Union action further by stipulating that “the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.”

As articulated in Article 5(3) TEU, subsidiarity itself appears to have been extended to protect not only the member states, but also the regional and local levels within member states, from undue Union action (see Box 6.4).

Box 6.4 Article 5(3) TEU on Subsidiarity

“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”

46 On the distinction, see N.W. Barber, “The Limited Modesty of Subsidiarity,” *European Law Journal* 11.3 (2005): 308–25.

47 Marc Luyckx, *Histoire philosophique du concept de subsidiarité* (Bruxelles: Commission des Communautés européennes, Cellule de prospective, 1992).

48 Giuliano Amato, “Plenary Speech,” in Raoul Blindenbacher and Arnold Koller (eds.), *Federalism in a Changing World: Learning from Each Other* (Montreal: McGill-Queen’s University Press, 2002), 577–81.

Moreover, it contains two additional provisions: all Union institutions “shall apply the principle of subsidiarity” in accordance with a separate protocol appended to the Treaty; and the member-state parliaments will “ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.”

The protocol mentioned is the *Protocol on the Application of the Principles of Subsidiarity and Proportionality*, but its content has taken a dramatically different form. Instead of general declarations of intent, it now contains specific and detailed procedural rules: legislative draft proposals will be reviewed by the Council of Ministers and the European Parliament, as well as by the national parliaments (Article 4); they need to contain detailed qualitative and quantitative statements about the financial impact upon member states, regional or local authorities, and businesses and citizens (Article 5); by majority, the national parliaments can force a review of draft proposals, and by a two-thirds majority they can force a vote: the draft fails if 55 per cent of Council members or a majority of votes in the European Parliament agree that it is not compatible with the principle of subsidiarity (Article 7); and finally, complaints about infringements of subsidiarity can be brought before the European Court of Justice (Article 8; see Chapter 11).

Significance

European Union federalism radically departs from conventional approaches to the division of powers in several ways. Under the principle of subsidiarity, the intended certainty of constitutional stipulations has been replaced by procedural flexibility. To an extent, this is owed to the fact that the EU is still in the process of further integration. To another extent, however, it is also owed to the nature of the Union, which, contrary to the opinion expressed in Joschka Fischer's *Quo Vadis* speech, may elude “finality” altogether.

More importantly, the reliance on subsidiarity fundamentally changes how we think about the division of powers, both in its legislative form by assigning different policy fields to different levels of government, and in its administrative form by separating legislation from administration. Under the principle of proportionality, the exercise of legislative power *within* policy fields is divided. The classical question of federalism—who has the power to do what—is transformed into who is authorized to do how much of what. In an increasingly complicated world of overlapping and interdependent interests, this may have model character for a future in which a tidy assignment of powers can no longer be expected.

While proportionality was already part of the subsidiarity provisions in earlier treaties, the real novelty of the Lisbon Treaty is the role given to national parliaments in the process of legislation at the draft stage. Conventional federal systems do not accord to member-state parliaments a control function over proposed federal legislation. While this role is essentially only a consultative one, it

nevertheless makes the process more inclusive, accountable, and hence legitimate, by establishing a kind of “early-warning system” for compliance with the principle of subsidiarity.⁴⁹ Again, this would appear to be a noteworthy step toward legitimacy by means of deliberative inclusion, with model character in a world increasingly characterized by multilevel governance and authority.

Imitations and Variations

With regard to the division of powers, the four models examined so far exemplify both traditional and innovative patterns of approach and design. In historical sequence, this examination also reveals a learning process toward ever more complexity, from the American single-list approach to the multiple lists and conditioning clauses of later federal systems, and finally to the EU’s limited and flexible task allocation. Nevertheless, there is considerable variability beyond these models. We may generally distinguish between cases of traditional imitation and those of more innovative variation.

Traditional Imitation

Perhaps the most acute case of imitation is that of Australia, where the constitution was patterned almost slavishly on the American model of legislative and divided federalism. It grants a single limiting list of powers to the Commonwealth government and relies on a simple assertion of residual power to protect the state governments (s.107). As with the US design, this was intended to keep the central government within a set of jurisdictional confines; and as with the US case, it manifestly failed to do so. There is no doubt that the framers of the Australian Constitution were looking for a limited transfer of powers to the new Commonwealth government and the maintenance of state primacy in domestic fields. Delegates to the constitutional conventions—especially those from the smaller colonies—were repelled by the Canadian approach, failing to see the accumulating evidence that centralist intentions had not translated into a particularly centralist design: “The Australian draftsmen took from their two precedents precisely the two features calculated to lead to an expansion of central power”—the American idea of a relying on a single list and the Canadian tendency to list powers in greater detail.⁵⁰ And as was typically the case elsewhere, there was little debate about which powers should be assigned to the central government and which to the constituent units.⁵¹

⁴⁹ See Philipp Kliver, *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality* (Abingdon, UK: Routledge, 2012).

⁵⁰ James Crawford, “The Legislative Power of the Commonwealth,” in Gregory Craven (ed.), *The Convention Debates 1891–1898: Commentaries, Indices and Guide* (Sydney: Legal Books, 1986), 114.

⁵¹ J.A. La Nauze, *The Making of the Australian Constitution* (Carlton: Melbourne University Press, 1972), 5.

The federal division of powers in South Africa, on the other hand, essentially followed the German model by establishing a cooperative pattern of administrative and integrated federalism. While concurrency predominates, and the provinces have been assigned only a very limited range of exclusive powers over mostly parochial matters, the national government has been given sweeping powers to set national standards and norms. In the name of national unity, it may even legislate in the area of exclusive provincial powers, and it can almost routinely override provincial laws in the concurrency field. Clearly, the division of powers in South Africa was designed as "one of national legislative leadership and direction, with lower levels chiefly focused on implementation and delivery of nationally-mandated programmes."⁵² As a consequence, the South African federal system appears highly centralized and leaves to the provinces little room for autonomous development. Obviously, this was so intended, as it was in the German case. Only time will tell whether the far more diverse South African provinces can find ways of breaking out of the straightjacket of central supervision, and whether this will threaten the viability of the South African federal experiment.

A more complex case of imitation is Switzerland, which over time moved from a single-list to a multiple-list approach, and from legislative to administrative federalism. It did so by means of numerous amendments to the original constitution of 1848, as well as two thorough constitutional revisions, in 1874 and most recently in 1999.

The original intention was a single-list approach that would largely retain the traditional character of Switzerland as a confederation among sovereign cantons. Article 2 limited the general purpose of the national government to the protection of independence, domestic peace, and the advancement of common welfare. Article 3, unchanged through all revisions, then immediately and explicitly in the strongest possible terms assigned residual powers to the cantons: "The cantons are sovereign so far as their sovereignty is not limited by the Federal Constitution; they shall exercise all rights which are not transferred to the Confederation."

Yet the Swiss constitutional framers did not resort to a single list of enumerated national powers, as did the Americans. With their confederalist caution they have taken the approach of allocating powers clause by clause, each time carefully stipulating what the national parliament is allowed to do and what remains with the cantons.⁵³ This approach is even more evident in the 1999 constitution. Its second

⁵² Christina Murray and Richard Simeon, "Promises Unmet: Multi-Level Government in South Africa," in Rekha Saxena (ed.), *Varieties of Federal Governance: Major Contemporary Models* (New Delhi: Cambridge University Press, 2011), 23.

⁵³ Thomas Fleiner, "Swiss Confederation," in Akhtar Majeed, Ronald L. Watts, and Douglas M. Brown (eds.), *Distribution of Powers and Responsibilities in Federal Countries* (Montreal: McGill-Queen's University Press, 2006), 266.

chapter, on responsibilities, is subdivided into various sections such as education, environment, transportation, energy, and communication, and in each case the extent of national government responsibility is then specified under these subheadings. As is now manifest in the 1999 constitution, national powers were extended over time, and more often than not they were defined as joint responsibilities. Concurrency or power sharing has almost become the norm.

The Swiss Constitution has thus evolved from a single-list approach to the adoption of three lists—even though these are not neatly packaged in three sections, as in the Canadian case. In addition, or perhaps as a consequence, Swiss federalism has turned to administrative federalism.⁵⁴ Already prior to the 1999 revisions, federal laws were increasingly cast as framework legislation,⁵⁵ and Article 46 of the new constitution now states unequivocally that the cantons are in charge of implementing and administering national law. In this sense, the Swiss approach to dividing powers follows the German model. However, it does so with a very different inflection: while the result in Germany has been described as a “unitary federal state,” Switzerland’s version of administrative federalism allows for a continuing high degree of cantonal autonomy.⁵⁶ This is one of the reasons for Switzerland to be characterized as “the country that, more than any other, embodies the spirit of the federal idea.”⁵⁷ It is also consistent with the fact, as we will discuss in Chapter 8, that Switzerland does not have a council-type second chamber like Germany’s *Bundesrat*.

One area in which provisions of power sharing are conspicuously absent is the regulation of language. Article 109 of the 1848 constitution had simply identified German, French, and Italian as the three national languages.⁵⁸ Since the constitution was otherwise silent about language, however, it fell to the cantons to regulate linguistic matters within their boundaries. In the 1999 constitution, this has been given explicit expression in Article 70, which declares that “the cantons shall designate their official languages.” Effectively, this has given final constitutional expression to a long-standing tradition of linguistic territoriality.⁵⁹ With four exceptions, the cantons are officially unilingual.

54 *Vollzugsföderalismus* or “implementation federalism.”

55 Bernard Dafflon, “Fiscal Federalism in Switzerland: A Survey of Constitutional Issues, Budget Responsibility and Equalisation,” in Amedeo Fossati and Giorgio Panella (eds.), *Fiscal Federalism in the European Union* (New York: Routledge, 1999), 269.

56 Dietmar Braun, “Multi-level Governance in Germany and Switzerland,” in Henrik Enderlein, Sonja Wälti, and Michael Zürn (eds.), *Handbook on Multi-level Governance* (Cheltenham, UK: Edward Elgar, 2010), 169–70.

57 Paolo Dardanelli, “Federal Democracy in Switzerland,” in Michael Burgess and Alain-G. Gagnon (eds.), *Federal Democracies* (Abingdon, UK: Routledge, 2010), 143.

58 Now Article 4; Romansch was added as a fourth national language in 1938.

59 Fleiner, “Swiss Confederation,” 271–72.

Innovative Variation

As we have seen, the adoption of the principle of subsidiarity in the European Union constitutes a novel approach to the division of powers in an evolving federal system with strong national identities and sensitivities. The EU, in other words, had to invent a different way of assigning authority, as the conventional patterns of dividing powers were not acceptable to the member states. A similar case is Spain, even though its process of federalization was driven by the opposite dynamic: the devolution of a unitary state rather than the integration of separate states.

While linguistic territoriality all but removed cultural diversity as a conflictive issue from Swiss federalism, it was a defining issue in the transition of Spain from centralized dictatorship to federalized democracy. Immediate recognition of self-governing autonomy for the three historic nationalities—Catalonia, Galicia, and the Basque Country—was a precondition for that transition. The problem was how to extend principles and mechanisms of regional self-government across the entire Spanish territory. In order to achieve this, the 1978 constitution set in motion a two-track process whereby “nationalities and regions” (Section 2) could constitute themselves as autonomous communities (ACs), a fast track aimed at the three historical nationalities (Section 151), and a more elaborate normal track for all others (Sections 143–47).⁶⁰ Once constituted, these ACs then had to negotiate the range of self-governing powers with the national parliament (*Cortes Generales*) to be laid down in separate Statutes of Autonomy.

To this effect, the constitution provided two lists of powers. Section 148 amounts to an open list of 22 areas in which the ACs “may assume competences.” It furthermore contains a proviso of possible further power transfers after a five-year transition period “within the framework laid down in section 149.” At first glance this latter stipulation appears surprising because Section 149 declares itself to be a list of “exclusive” national competencies. However, closer inspection reveals that among the 32 items listed, there are not only the usual exclusive powers such as international relations, defence, customs, and the monetary system, but also a much longer enumeration of powers where the national government has responsibility only for developing “basic” or framework legislation “without prejudice” to the powers that have been or may be vested to the ACs. Thus Spain can be said to have a mixture of both legislative and administrative federalism in its constitutional arrangements.⁶¹

The original intention and expectation of the Spanish constitutional designers was that only the historical ACs would eventually assume a full range of powers.

60 Andalusia was subsequently granted access to the fast track.

61 Eric Argullol and Xavier Bernardí, “Kingdom of Spain,” in Akhtar Majeed, Ronald L. Watts, and Douglas M. Brown (eds.), *Distribution of Powers and Responsibilities in Federal Countries* (Montreal: McGill-Queen’s University Press), 245.

However, over the course of time all 17 ACs have established themselves as fully developed self-governing entities, although a considerable degree of asymmetry remains.⁶² As a number of ACs, following the lead of Catalonia, have initiated amendments to—or even wholesale revisions of—their autonomy statutes, the dynamic may be from asymmetry to symmetry and back to more asymmetry. The innovative contribution of the Spanish case to the division of powers in federal systems, however, lies in a constitutional model that “permitted regions, following different procedures justified on historical and political grounds, a broad leeway to choose, through their regional statutes of autonomy, the degree of devolution they desired among the possibilities offered by the Constitution.”⁶³ In this way, the open-ended construction of the Spanish Constitution and its assignment of powers offers an interesting model more generally. At least implicitly, it acknowledges that time and circumstance will change what at any given moment may appear as the most reasonable and effective distribution of powers. And, by avoiding the enumerated finality of the classical list approach, it suggests that the role of constitutions in federal systems of divided governance is to provide not so much juridical finality as political guidance in search of mutually acceptable solutions.

Another and altogether different approach to the assignment of powers in federal systems that is worth mentioning is Belgium. As we saw in Chapter 5, the federal constitution of 1993 distinguishes between territorial regions and cultural communities. Accordingly, powers are divided not only between the national and subnational levels of government but between two different types of subnational government as well. While the regions exercise powers over a wide range of territorial and economic matters, the communities have been given jurisdiction over matters of culture and education. This is significantly innovative insofar as it points to possibilities of a non-territorial power assignment to groups of people with some form of common identity yet dispersed across regional boundaries. Unsurprisingly, perhaps, the grounding of Belgium’s federal system in cultural diversity means that federalization has proceeded along the classic lines of American-style legislative federalism rather than Germany’s administrative approach.⁶⁴

62 Luis Moreno and César Colino, “Kingdom of Spain,” in Luis Moreno and César Colino (eds.), *Diversity and Unity in Federal Systems* (Montreal: McGill-Queen’s University Press, 2010), 302.

63 César Colino, “Constitutional Change without Constitutional Reform: Spanish Federalism and the Revision of Catalonia’s Statute of Autonomy,” *Publius* 39.2 (2009): 263.

64 Hugues Dumont, Nicolas Lagasse, Marc van der Hulst, and Sébastien van Drooghenbroeck, “Kingdom of Belgium,” in Akhtar Majeed, Ronald L. Watts, and Douglas M. Brown (eds.), *Distribution of Powers and Responsibilities in Federal Countries* (Montreal: McGill-Queen’s University Press, 2006), 41–42.

Fiscal Federalism

DESIGNING THE FIRST MODERN FEDERAL SYSTEM, the Americans followed what seemed to be a simple rationale for the division of powers: the new federal government would assume those powers necessary for the establishment and maintenance of a common economic union as well as for internal and external security. Mindful of how frustratingly inefficient the confederation had been in its dependency on the states' willingness to supply necessary financial resources, these powers also included a plenary power to tax (see Chapter 6). However, there was no particular rationale for how financial resources would be divided or shared between the two levels of government. Indeed, as they were granted residual powers, the states, with few explicit limitations, were equally free to tax as they wished.

The assumption was that they would not need to wish for much. Alexander Hamilton, for instance, confidently remarked that the states would not need a great taxing power since they “will naturally reduce themselves within a very narrow compass” (*Federalist* 34). He simply could not foresee the transformation of the role of government in the wake of the economic modernization and welfare-state building that occurred mainly a century later. National governments assumed responsibility for macroeconomic management, the tools of which are fiscal and monetary policy, and along the way they captured the most lucrative revenue sources—personal and corporate income tax in particular. Meanwhile, subnational governments became saddled with what turned out to be the most expensive service-delivery responsibilities such as health, education, and infrastructural development.

The result was a discrepancy between spending responsibilities and revenue capacities at both levels of government. In order to provide some sense of balance and equity, intergovernmental relations became almost synonymous with fiscal transfers from the central to the subnational level of government by means of grants, joint program financing, or tax-sharing schemes.

The advantaged fiscal position of most national governments has been a major factor in driving the centralization of federations over the past century. The founders of federal systems often failed to recognize or acknowledge the power that would flow to central governments from having surplus revenue. Quite possibly, central governments could make a mockery of the constitutional division of powers by using their spending power to exert influence or even assert control in areas of subnational jurisdiction. Assuming responsibility for macroeconomic management further transferred primary economic sovereignty to the national government. How much economic sovereignty remained with

the constituent units depended on two things: the degree of “own-source” revenue they retained, and the extent to which they retained a licence to borrow.

At the same time, as economic modernization developed unevenly across subnational boundaries, and typically the member units of federations were unevenly endowed with natural, human, and productive resources to begin with, significant levels of horizontal fiscal disparity developed. In order to allow for equitable provisions of public services across the country, most federations resorted to programs of fiscal equalization, which can be seen as intrinsic to the broader community of interest that constitutes a federation.

In some way, then, fiscal federalism is only a part of the division of powers and the combination of divided and shared rule resulting from it. In another way, however, it carries such weight in how federal systems operate in practice that a separate look at comparative patterns of public finance is in order.

Patterns of Public Finance

The generally accepted principles of **tax assignment** are quite simple. Each level of government should have access to revenues proportional to its expenditure needs, and mobile tax sources should be centralized in order to minimize tax competition, forcing subnational jurisdictions to drive down rates.¹ The trouble is that these two considerations may not always be compatible. Centralization of high-yielding mobile tax sources such as corporate and personal income taxes, for example, will inevitably give central governments disproportionately greater revenue and leave the constituent units short. The federal **spending power** resulting from this tax centralization may be justified as a means for income redistribution and other national priorities or inequity issues across jurisdictions; however, it may simply enhance the power of the central government to intervene at will in areas of subnational jurisdiction.²

Fiscal equalization is meant to correct subnational differences of revenue-raising capacity or public-service cost in the name of public-service equality and factor mobility within a common economic union. But it also may be a disincentive for additional fiscal effort if most of it is siphoned away from richer jurisdictions, and it may keep poorer recipient jurisdictions in a complacent state of transfer dependency.³

1 On the whole issue see Robin Boadway and Anwar Shah, *Fiscal Federalism: Principles and Practices of Multiorder Governance* (New York: Cambridge University Press, 2009).

2 See Noah Zon, *Slicing the Pie: Principles for Allocating Transfer Payments in the Canadian Federation* (Toronto: Mowat Centre, University of Toronto, 2014).

3 See Hansjörg Blöchliger and Claire Charbit, “Fiscal Equalisation,” *OECD Economic Studies* 44.1 (2008): 1.

A final issue is **public borrowing**. Under a federal regime of shared fiscal sovereignty, it would only seem appropriate that subnational governments have the same right to borrow and create debt as the national government—and perhaps more so, as they often lack sufficient tax powers to be fiscally independent. Yet excessive borrowing and debt by one or some subnational governments can damage a federation's overall financial standing and ultimately require costly national bailouts, which not only penalize taxpayers elsewhere but moreover may encourage a further lack of fiscal discipline.⁴

Tax Assignment

In their hunt for ever more revenue, governments have been inventive in imposing what amounts to an almost infinite variety of taxes, duties, and fees. Only a few of these have to be considered, however, in order to understand the main patterns of tax assignment in federal systems. In fact, there are only three types of taxes that really count, because these normally constitute the main bulk of revenue: direct taxes on personal income, direct taxes on corporate income, and indirect transactional taxes on sales, turnover, or added value. In some federations, another important source of revenue is royalties from natural resources, which create a particular problem of equity and proportionality when the more valuable resources are unevenly distributed. In addition, there is the tax on real property, usually in the exclusive domain of municipalities and invariably the most important independent source of revenue at the local level of government.

There are three basic ways of assigning revenue sources to different levels of government. The first one is **exclusive** tax assignment. At the beginning of modern federalism, the collection of customs duties logically became an exclusive federal power in order to secure the desired goal of a national economic and customs union. It was then also one of the most important sources of revenue. Article I, Section 10 of the American Constitution explicitly prohibits the states from taxing imports or exports; the Australian Constitution dedicates a full ten articles (87–96) on the transitional creation of a customs union with ultimately exclusive Commonwealth powers to levy duties on import and export. In addition to customs duties, the German Basic Law, with its inexorable penchant for micromanaged precision, lists no fewer than six other exclusive federal tax powers, and it also identifies five exclusive tax powers for the *Länder*, including the right to impose a tax on beer (Article 106). With the exception of the aforementioned local property taxes, however, none of these exclusive tax sources plays a major or decisive role in how revenue is apportioned among the different levels of government.

⁴ See Jonathan Rodden, *Hamilton's Paradox: The Promise and Peril of Fiscal Federalism* (New York: Cambridge University Press, 2006).

The second way of assigning tax power is **concurrency**. As we already saw, this was the historical default option because raising taxes except for military and security purposes was not a dramatic issue before the ascendance of modern government. It was simply expected that each level of government would naturally raise revenue in proportion to expenditure needs, and that excessive taxation would be kept in check by the people or their representatives. Broad tax concurrency is characteristic of the American, Canadian, and Australian systems, where both levels of government were given access to all major revenue sources except the tariff. Whether and how they exploit those opportunities is a separate question. There is no national sales tax in the United States, but this is not for lack of constitutional authority. Similarly, it is out of choice, not constitutional necessity, that the oil-rich Canadian province of Alberta has opted not to impose a sales tax. What must be kept in mind is that concurrency does not mean equality in any of these federations. As we noted in Chapter 6, a supremacy clause almost always makes the national government "more equal."

The third approach generally can be placed under the heading of **tax sharing**—although significant variations exist in definition and practice. Tax sharing differs from concurrency in that the revenue from major tax sources is divided among different levels of government according to a fixed or otherwise reliable formula. Depending on the degree of reliability, the portions assigned to each level can be considered nearly equal to own-source revenue. The most prominent example is Germany, where the Basic Law stipulates that income and corporate taxes must be shared equally by the federation and the *Länder*, and that the share of the value added tax for each level of government has to be determined by federal law requiring consent of the *Bundesrat* (Article 106[3]). In South Africa, where the provinces are constitutionally prohibited from having access to any of the major tax sources (Article 228), most revenue instead goes into a National Revenue Fund (Article 213), whence "equitable shares" of revenue are to be allocated annually to all three spheres of government by an Act of Parliament (Article 214). By comparison, the temporary program known as "General Revenue Sharing" that existed in the United States from 1972 until 1986 was a largely unconditional grants program that does not qualify as a principled choice of tax assignment in federal systems.

An altogether different approach, finally, is that of the European Union. Its budget is made up of member-state contributions from various sources as agreed under the treaties. Since these treaties have quasi-constitutional status and can be amended only through unanimous agreement (see Chapter 10), these contributions are officially treated as own-source revenue. But one can also see them as a form of tax or revenue sharing similar to the German system.

Gaps, Imbalances, and the Federal Spending Power

Recent literature identifies the formal mismatch between revenue and expenditure assignment as a **vertical fiscal gap**.⁵ Such gaps occur for two obvious reasons, which are usually closely related. On the one hand, as is almost always the case, the federal government collects more revenue than it needs for its own operation and programs. In Canada, for example, almost a quarter of the federal government's outlays are in the form of transfers to the provinces and territories—and Canada has by no means the largest fiscal gap.⁶ On the other hand, as is almost always the case as well, subnational governments raise less revenue than they need for program spending assigned to them. On average, the Canadian provinces and territories rely on those transfers for almost 20 per cent of their revenue. In Australia, the gap is much wider, with the states being dependent on federal transfers for fully half their revenues.⁷ The mismatch between available revenue and expenditure needs that remains at the subnational level after transfers is identified as a **vertical fiscal imbalance**. There is little consensus, however, on exactly how to measure this imbalance because it depends not only on the level and reliability of gap-filling federal transfers, but also on subnational fiscal policy and spending habits.⁸

The gap is typically filled by intergovernmental transfers or grants that in practice range from general revenue funding to “bloc grants,” and to conditional or “tied grants.” The issue of transfers opens the question of the spending power. Enjoying access to greater revenue than they need for their own purposes, central governments in federal systems can make conditional grants to subnational governments in areas of policy-making over which they do not have constitutionally assigned jurisdiction.⁹ These provide central governments with considerable extra-jurisdictional leverage allowing them to direct the activity of subnational jurisdictions. In many instances, this will be broadly accepted or even welcomed in the name of national priorities and objectives, and legitimately covered under the broad constitutional clauses giving federal governments authority over general welfare, economic unity, peace, order,

5 Anwar Shah, “Introduction: Principles of Fiscal Federalism,” in Anwar Shah (ed.), *The Practice of Fiscal Federalism: Comparative Perspectives* (Montreal: McGill-Queen's University Press, 2007), 28.

6 Sixty-five billion of the \$280-billion 2014–15 budget. Government of Canada, *Budget 2014*.

7 Alan Morris, “Commonwealth of Australia,” in Anwar Shah (ed.), *The Practice of Fiscal Federalism: Comparative Perspectives* (Montreal: McGill-Queen's University, 2007), 57.

8 See Izabela Karpowicz, “Narrowing Vertical Fiscal Imbalances in Four European Countries,” *IMF Working Paper* WP12/91 (2012): 3–5.

9 Ronald L. Watts, *The Spending Power in Federal Systems: A Comparative Study* (Kingston, ON: Institute of Intergovernmental Relations, Queen's University, 1999), 1.

and good government, and so on. However, other uses will be seen as an inappropriate or even unconstitutional intrusion into subnational jurisdiction.

How intrusive this use of the spending power becomes depends on two things: the degree to which subnational governments are dependent on transfers, and the degree of conditionality attached to those transfers. Conditional grants allow the federal government to influence or even dictate subnational policy-making in virtually any field regardless of constitutional assignment. In the United States and Australia, the rise of conditional grants began early in the twentieth century with road funding.¹⁰ Because money is infinitely fungible—one dollar can be replaced by another—the first form of conditionality was typically “maintenance of effort” requirements or matched funding to ensure that recipient jurisdictions did not simply substitute grant funding for whatever effort they were already making in the area. Since then, governments have learned that conditional grants can deliver much greater policy influence through program delivery rules enforcing national policy goals and standards; and, as is the case particularly in the United States, there may even be conditions going way beyond the program for which the money was targeted: funds that the subnational governments are required to devote to highway construction, for example, might also contain requirements that a particular speed or blood-alcohol limit be imposed on all drivers as a condition of receipt (so-called crossover sanctions).

By most accounts, it is the conditional grants that have been most prominent in intergovernmental fiscal relations. Those who pay the piper call the tune, in federal systems as elsewhere. Only in federal systems, however, does this use of the spending power create particular problems of constitutionality and balance. Some federal constitutions have therefore avoided the ambiguity of the problem altogether. Separating the spending power as a legal issue from the power of law-making, they either entirely allow or entirely disallow it.¹¹ Thus section 96 of the Australian Constitution stipulates explicitly that “the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.” Meanwhile, the German Basic Law—as a general rule to which few and specific exceptions apply—does exactly the opposite: flatly disallowing any kind of “mixed financing” (*Mischfinanzierung*) under Article 104a(1) by stipulating that the “Federation and the Länder shall separately finance the expenditures resulting from the discharge of their respective responsibilities.”

Equalization

Federal fiscal transfers contribute to filling or even eliminating subnational fiscal gaps. They do not, however, directly address the problem of **horizontal fiscal**

¹⁰ Joseph E. Zimmerman, *Congressional Preemption: Regulatory Federalism* (Albany: State University of New York Press, 2005), 43.

¹¹ See Watts, *Spending Power*, 7.

disparity: the differing fiscal capacities that subnational governments have for the delivery of public services to their citizens. The main reasons for this disparity are regional differences in revenue base due to differing levels of economic development or access to valuable natural resources, and differences in regional expenditure needs. For a variety of reasons, therefore, federations engage in some kind and some degree of **fiscal equalization**.

As we discussed in Chapter 2, federalism is at least implicitly also about a balanced commitment to sharing the benefits of a larger union. That commitment includes the principle that people should be able to receive similar-quality services regardless of where they happen to live in the country. As economic fortunes can change over time, however, this commitment can also be interpreted as a form of risk-pooling: jurisdictions accept that today's good fortune may be tomorrow's need, and that what they share with others now, they may receive back in the future. Canada and Australia, for instance, saw major historical shifts in the twentieth century, with hinterland regions going from needy to wealthy status over the course of decades. In 2008, for example, it was announced that the most economically powerful province in Canada—Ontario—was becoming a recipient jurisdiction for the first time in its history, while the perennial recipient province of Newfoundland and Labrador would, for the first time, no longer require equalization payments.¹² But the commitment to horizontal fiscal equalization is not driven only by concerns of equality or solidarity. Disparate public-service levels across the country have an impact on factor mobility and thus on the overall stability and efficiency of the economic union.

With the notable exception of the United States, therefore, most federal systems have established fiscal equalization programs. Only some federations such as Germany, Canada, and Switzerland have written an obligation to fiscal equalization into their constitutions—thus acknowledging it as part of the basic compact of federal union. Such a constitutional obligation, however, is not an automatic indication of the degree to which equalization may actually be practised. While Germany has one of the most comprehensive systems of equalization, so does Australia—where no constitutional requirement for horizontal redistribution exists at all.

The existing variety of formula-driven equalization arrangements can be characterized in two basic ways.¹³ One is between horizontal and vertical transfer mechanisms. In horizontal arrangements, payments are transferred from richer to poorer subnational governments. In vertical arrangements, the federal government makes payments to the subnational governments out of its own

¹² Douglas M. Brown, "Fiscal Federalism: Maintaining a Balance?," in Herman Bakvis and Grace Skogstad (eds.), *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, 3rd ed. (Don Mills, ON: Oxford University Press, 2012), 132.

¹³ Blöchliger and Charbit, *Fiscal Equalization*, 5–6.

consolidated revenue. While most established federations use a combination of both, Australia relies exclusively on what is effectively horizontal equalization, and Canada is the only case of pure vertical equalization. The other distinction is between revenue and cost equalization. While the former calculates equalization payments by assessing the relative per-capita revenue-raising capacity of the various jurisdictions, the latter does so by calculating the relative per-capita cost of providing a standard suite of public services in the various jurisdictions. Again, as is particularly the case in Australia, most equalization arrangements contain a combination of both. Only Canada stands out as a case of an almost exclusive focus on relative revenue capacity.

The most important question is how ambitiously or thoroughly the system seeks to “equalize.” One approach is to settle for an amelioration but not an equalization. As practised in Canada, for instance, this means subsidizing poorer jurisdictions up to some sort of average level while leaving the rich jurisdictions with their extra wealth. A much more ambitious regime operates in Australia and Germany, where the aim is to bring all jurisdictions to a common level. This involves raising the poorer ones up and—rather more controversially—bringing the richest ones down. For the ameliorative approach, subsidies from the central government are typically sufficient, while full equalization requires a system that transfers directly from the rich to the poor.

Borrowing and Debt

Governments tax and spend, but they also borrow. Debt financing is essential for long-term capital investment, but it can be problematic when it becomes a case of governments living beyond their means. In federal systems, this is a particular problem insofar as the responsibility for economic and monetary union is centralized but responsibility for fiscal policy remains decentralized and shared. Subnational governments, in other words, may be as free to spend and borrow as the federal government without bearing the same risk for overall fiscal stability. Indeed, they may be freer in some ways since they have the national government to bail them out should the situation become dire. The most dramatic example of this in recent times has been the 2008 Euro crisis in the European Union, which despite agreed-upon—but unenforceable—borrowing guidelines ultimately required controversial bailouts of debt-ridden member states such as Greece.¹⁴

There are different ways of combatting the problem of profligate subnational borrowing and debt, although none has proven entirely effective.¹⁵ Among

14 See Dermot Hodson and Uwe Puetter, “The European Union and the Economic Crisis,” in Michelle Cini and Nieves Pérez-Solórzano Borragán (eds.), *European Union Politics*, 4th ed. (Oxford: Oxford University Press, 2013), 367–79.

15 The following mainly draws from Shah, “Introduction,” 12–13.

these, deference to international agencies' credit ratings is the most common and obviously lies outside the range of federal design. Some federations, such as the United States and Canada, have no federal policy of subnational debt control and simply have to rely on the states' or provinces' own fiscal conservatism. Others try to rely on moral persuasion or intergovernmental agreement. Some, such as Switzerland and most recently Germany, have established constitutional "debt-brakes" that limit or completely prohibit additional net borrowing. In all instances, however, loopholes or exceptions remain.

Fiscal Pluralism in the United States

As we noted, the Americans adopted the simplest approach to tax assignment. In its enumerated powers, Congress was granted a plenary power to tax; in their residual powers, the states were also left with a plenary—or almost plenary—power to tax. The one exception, and it was an important one, was a prohibition on state customs tariffs (Article I, section 10). Since, as we discussed in Chapter 5, economic integration has generally been one of the primary motivations for federating, a prohibition on such trade barriers is almost a *sine qua non* of a federal system.

The result of largely uncoordinated concurrency has been a relatively small vertical fiscal gap, as the states can generally muster sufficient fiscal resources for the public services they wish to provide. To this day, the American states generally levy their own personal and corporate income taxes alongside the federal income tax; they also levy their own sales taxes. If state finances are nevertheless threatened by a looming debt crisis, this has to do more with political unwillingness to cut services or raise taxes than with lopsided tax assignment.¹⁶ And if all this makes for a case of a decidedly pluralistic or "truly federal" tax structure, the lack of coordination also leads to serious mobility threats as well as much higher levels of inequality with regard to both after-tax income and public-service provision across states than in most other established federations.¹⁷

Assignment Choices

The only direct constitutional restriction on the federal power to tax in the 1789 constitution had been a clause requiring direct taxes to be levied "in proportion

16 See Robert A. Schapiro, "Polyphonic Federalism: the United States Experience," in Gabrielle Appleby, Nicholas Aroney, and Thomas John (eds.), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2012), 154–55.

17 William Fox, "United States of America," in Anwar Shah (ed.), *The Practice of Fiscal Federalism: Comparative Perspectives* (Montreal: McGill-Queen's University Press, 2007), 345–69; see also Janet G. Stotsky and Emil M. Sunley, "United States," in Teresa Ter-Minassian (ed.), *Fiscal Federalism in Theory and Practice* (Washington, DC: IMF, 1997).

to the number of inhabitants"—a concession to the slave states.¹⁸ Its removal by the Sixteenth Amendment in 1913 opened the door to the introduction of a federal income tax by Congress, which could now "lay and collect taxes on incomes" whichever way it wanted. This Congress not only did, but did so with vigour, coming to rely on personal and corporate income tax for almost all its revenue. By contrast with most other OECD countries, the US government does not levy any indirect tax on sales, turnover, or value added. Instead it has become heavily dependent on income-tax revenue (80 per cent of its total), and in turn controls most of that revenue (also 80 per cent).

Political choice rather than formal assignment also characterizes the way in which the states raise revenue. Overall, the personal income tax is the single most important source of revenue for US states—though not all choose to levy it.¹⁹ While 41 states levy their own income tax, 9 do not; and while 45 states impose a sales tax, 5 again do not. New Hampshire, for instance, has neither an income tax nor a sales tax. Almost all states—even New Hampshire—levy a corporate income tax. However, as we would predict from our understanding of competitive pressures on subnational jurisdictions in federal systems, corporate income tax makes a very limited contribution to state revenues and is regularly undermined by beggar-thy-neighbour investment incentives to entice business.²⁰ In general, choices are driven by radical differences in capacity and political willingness at both the state and local levels. There is an 88-per-cent per-capita income differential between the highest and lowest income states; per-capita personal income-tax collection varies from 8.4 to 13.1 per cent across states; and within one state, New Jersey in this instance, some counties have property-tax rates that are 2.5 times higher than others.²¹

Congressional legislation and supportive court rulings restrict the states from imposing taxes whenever this is deemed to distort interstate commerce. This is generally considered to be the case when a state wants to tax economic activities not sufficiently grounded within its own boundaries by physical presence of a vendor or corporation. In an age of high economic mobility, this restriction constitutes a significant constraint on collecting both sales taxes from remote vendors (increasingly via the Internet) and corporate tax from multistate firms.

18 Article 1(2); see Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005), 88–99.

19 Joseph J. Cordes and Jason N. Juffras, "State Personal Income Taxes," in Robert D. Ebel and John E. Petersen (eds.), *The Oxford Handbook of State and Local Government Finance* (New York: Oxford University Press, 2012), 300–32.

20 David Brunori, "State Corporate Income Taxes," in Robert D. Ebel and John E. Petersen (eds.), *The Oxford Handbook of State and Local Government Finance* (New York: Oxford University Press, 2012), 333–51.

21 Fox, "United States of America," 354–56.

Interstate cooperation on formula-apportioned corporate tax collection exists but finds practical limits in the differences in tax laws from state to state. In fact, it appears that by spreading themselves thinly enough across states, some corporations generate “nowhere income” that cannot be taxed by any state.²²

Conditionality Rules

Even though, with about 60 per cent of revenue raised nationally, American fiscal federalism is not excessively centralized, the federal government as in all other cases collects far more than it needs to satisfy its own program responsibilities. This surplus constitutes the federal government’s spending power. How much of federal transfers to state and local government actually serves the purpose of filling subnational fiscal gaps rather than the pursuit or imposition of national objectives is largely a matter of interpretation. Up until the “Great Recession” of 2009, transfers made up only a fifth of state and local revenue.²³ The fact that most of these transfers are **conditional grants**—“categorical grants-in-aid” as the Americans call them—is an indication that they predominantly serve a national rather than a subnational agenda. It also means that in the United States the federal government actively exploits what fiscal advantage it enjoys to maximize policy leverage over the states. Of course, states are not obliged to accept grants whose conditions they oppose or find too onerous—and indeed, as we will see in Chapter 11, it is this technically voluntary character that makes the spending power constitutional. For partisan and other reasons, states do occasionally “leave money on the table.”²⁴ However, that is very much the exception to the rule.

An extensive range of strongly conditional grant programs forms part of a wider network of **mandates**—both funded and unfunded—through which Congress has come to impose its policy objectives on the states since the New Deal era in the 1930s.²⁵ A large number of these grants are conditional in the requirement both that they be spent on a particular item and that state or local governments match funding. As with other federal systems, public health care dominates—Medicaid alone accounted for over 50 per cent of all transfers to the states in 2008.²⁶ Empirical studies suggest “that grants exert a powerful influence

22 Fox, “United States of America,” 356–61.

23 Raymond C. Schepach and W. Bartley Hildreth, “The Intergovernmental Grant System,” in Robert D. Ebel and John E. Petersen (eds.), *The Oxford Handbook of State and Local Government Finance* (New York: Oxford University Press, 2012), 937–57.

24 Sean Nicholson-Crotty, “Leaving Money on the Table: Learning from Recent Refusals of Federal Grants in the American States,” *Publicus* 42.3 (2012): 449–66.

25 Paul Posner, *The Politics of Unfunded Mandates: Whither Federalism?* (Washington, DC: Georgetown University Press, 1998).

26 Schepach and Hildreth, “The Intergovernmental Grant System.”

on both the level and composition of spending by recipient governments.”²⁷ This is in no small part due to the aggressiveness with which Congress has imposed conditions. These include “cross-cutting requirements” that impose conditions applicable to all grants, and “crossover sanctions” whereby small grants carry conditions enforced by connection with other and larger grants.²⁸ Cross-cutting requirements are used to impose a wide range of political and social regulation on the states, such as equal rights, environmental standards, and assistance for the handicapped.

The introduction of General Revenue Sharing (GRS) by the Nixon Administration in 1972 was intended to alter this dominant characteristic of American federalism by replacing specific-purpose program payments with **block grants** that restored some policy autonomy to state and local governments. By the time GRS was eliminated in the name of spending restraint and competitive federalism in 1982, a total of \$83 billion in general purpose payments had been made.²⁹ Even GRS funds came with cross-cutting requirements, though, and their elimination only confirmed the American emphasis on conditional grants, which comprise over 80 per cent of all payments to the state and local governments.

Conditional grants and mandates amount to what has been called a regime of “coercive federalism” in the United States. Conditions of aid are imposed to “achieve federal objectives that lie outside Congress’s constitutionally enumerated powers and to extract more state–local spending on federal objectives.” And despite efforts at reining in the proliferation of mandates since 1995, estimates are that mandated conditions still shifted about \$130 billion in unfunded cost to the states during the 2004–08 fiscal period.³⁰ They also enable an “opportunistic federalism” whereby Congress can intervene in areas of state jurisdiction at whim.³¹ As grants and mandates are overwhelmingly meant to assist the poor and disadvantaged, “coercive” is not necessarily a bad thing, though. As in the case of civil rights more generally, the federal government has taken on the role of the nation’s social conscience. Along the way, however, the federal form as

27 Stotsky and Sunley, “United States,” 372.

28 Posner, *Politics of Unfunded Mandates*, 4.

29 Bruce A. Wallin, *From Revenue Sharing to Deficit Sharing: General Revenue Sharing and Cities* (Washington, DC: Georgetown University Press, 1998), 120.

30 John Kincaid, “The Rise of Coercive Federalism in the United States: Dynamic Change with Little Formal Reform,” in Gabrielle Appleby, Nicholas Aroney, and Thomas John (eds.), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2012), 173–75.

31 Tim Conlan, “From Cooperative to Opportunistic Federalism: Reflections on the Half-Century Anniversary of the Commission on Intergovernmental Relations,” *Public Administration Review* 66.5 (2006): 663–76.

originally designed has greatly suffered. The use of conditional grants to impose policy on the states has also fuelled a complex dynamic whereby states seek to protect themselves against or subvert policy and program decisions imposed from above.³²

Absence of Equalization

Among the major established federations, the United States is the only one without a fiscal equalization program—a “lesser-known aspect of ‘American exceptionalism.’”³³ The widely accepted reason is that “factor mobility has served to bridge fiscal and economic differences to a great extent”—at least across states if not within states.³⁴ Equalization, in other words, is not considered necessary because the free market works. Whether this faith in the self-regulating forces of the market is supported by factual evidence or not is beyond the scope of our analysis. What is not, however, is the comparative observation that there are several other reasons for the lack of a commitment to fiscal equalization.

American federalism has never been the expression of a desire to create equitable living conditions for all citizens to the extent that holds true for Germany or Canada. On the contrary, “Americans tolerate, even support, large variations in living standards within the country.”³⁵ Racial politics have contributed to a resistance to principles of social citizenship that has militated against redistribution in general and equalization in particular.³⁶ The provision of comparable public services at comparable rates of taxation across jurisdictions simply is not on the radar screen of American fiscal policy. For better or worse, a paramount commitment to individualism overrides notions of community, partnership, and regional identity protection prevalent in other federations. When massive south-to-north movements of labour and equally massive movements of capital in the opposite direction are cited as evidence that economic equalization works because they have narrowed the income differential between these two regions in the

32 John D. Nugent, *Safeguarding Federalism: How States Protect Their Interests in National Policy-Making* (Norman: University of Oklahoma Press, 2009).

33 Daniel Béland and André Lecours, “Fiscal Federalism and American Exceptionalism: Why Is There no Federal Equalization Program in the United States?,” *Journal of Public Policy* 34.2 (2014): 304.

34 Anwar Shah, “Comparative Conclusions on Fiscal Federalism,” in Anwar Shah (ed.), *The Practice of Fiscal Federalism: Comparative Perspectives* (Montreal: McGill-Queen’s University Press, 2007), 389.

35 Daphne Kenyon and John Kincaid, “Fiscal Federalism in the United States: The Reluctance to Equalize Jurisdictions,” in Werner W. Pommerehne and George Röss (eds.), *Finanzverfassung im Spannungsfeld zwischen Zentralstaat und Gliedstaaten* (Baden-Baden: Nomos, 1996), 38.

36 Béland and Lecours, “American Exceptionalism,” 317–18.

United States,³⁷ it becomes evident that primarily economic actors rather than public policy are expected to provide equilibrium.

Apart from ideological opposition, there are also political factors that would make an American equalization program extremely difficult to establish.³⁸ Congressional pork-barrelling defeats any notion of systematic support for poorer jurisdictions. The enormous size of the defence industry alone, and the asymmetric flow of federal defence dollars to places of strategic importance with regard to research or production, would create an almost insurmountable obstacle to substantive equalization. In addition, the United States has not felt the twentieth-century separatist pressure that has prompted equalization initiatives in Australia and Canada.³⁹

All this is not to say that equalization concerns are entirely absent in American fiscal federalism. Federal program-specific or "earmarked" grants are usually designed with the objective of improving living conditions of the disadvantaged by assisting state fiscal capacity. Especially when they come with matching conditions, however, they will exacerbate rather than equalize uneven fiscal capacities because poorer states simply will spend less on particular programs and consequently receive fewer matching funds. Some such grants therefore have been designed with a scale of matching rates inversely related to per-capita state income (between 50 and 77 per cent in the case of Medicaid, for instance). States have similarly used earmarked grants to school districts with a matching rate inversely related to the districts' tax-raising capacity. The overall result, however, has been weak at best, as poorer jurisdictions still will be "less willing or able to put up their own funds" even when they get a more favourable matching rate.⁴⁰

Borrowing as Sovereigns?

The American states enjoy a constitutional and fiscal autonomy that allows them to borrow "essentially as sovereigns."⁴¹ As we noted above, this potentially creates the moral hazard problem that states could spend and borrow recklessly, knowing that the nation as a whole will come to their rescue should they default. Following the refusal of the federal government to bail out defaulting states in the early nineteenth century, however, the vast majority have inserted

³⁷ See Wallace E. Oates, "On the Evolution of Fiscal Federalism: Theory and Institutions," in John Kincaid (ed.), *Federalism: Fiscal Features, Federal Failures, and the Future of Federalism*, Volume IV (Thousand Oaks, CA: Sage, 2011), 52.

³⁸ See Kenyon and Kincaid, "Fiscal Federalism," 46–49.

³⁹ Béland and Lecours, "American Exceptionalism," 315.

⁴⁰ Blöchliger and Charbit, *Fiscal Equalization*, 15.

⁴¹ Rodden, *Hamilton's Paradox*, 142.

balanced-budget rules into their respective constitutions.⁴² Thus the states operate under self-imposed fiscal constraints that make them much less likely to accumulate debt than the US federal government. This has had, however, an adverse unintended macroeconomic consequence. The United States is distinctive in the degree to which such fiscal tightening at the state level during recessions tends to undermine the pump-priming effect of deficit spending undertaken at the national level and thus compromises efforts to manage the economy.⁴³

Fiscal Balance in Canada

Canada, it has been said, “represents the textbook best-practice system of fiscal federalism.”⁴⁴ The two levels of government have own-source revenues in reasonable proportion to their spending responsibilities; transfers from the central government serve national objectives in a relatively unintrusive way; and a compromise system of fiscal equalization ensures that no regions are left behind. Of course, those living with the system—the governments and societies of Canadian federalism—have their grievances and criticisms: varying political commitment to debt control at the national level determines the ebb and flow of federal transfers supporting the provincial delivery of public services; infrastructure in many large municipalities is overdue for renewal; Québec remains dissatisfied; the vertical fiscal equalization scheme is under duress as fiscal disparity is exacerbated by provincial ownership of natural resources; and a reversal of economic fortunes temporarily put the most populous province, Ontario, into the recipient category.

Tax Harmonization

The Canadians adopted a slightly more complicated approach to tax assignment than the Americans. In its list of exclusive national powers, parliament was given a plenary authority to tax. In their list of exclusive powers, the provinces were given authority to levy “direct” taxes. Apart from the awkward question of how the two jurisdictions could exercise “exclusive” powers over the same subject, the provincial limitation to direct taxation appeared to exclude them from access to indirect taxation. According to standard definition, direct taxes are imposts on income and wealth—by contrast with indirect taxes, which are imposts on transactions, notably the sale of goods and services. In practice, the Canadian

42 John Kincaid, “The Constitutional Frameworks of State and Local Government Finance,” in Robert D. Ebel and John E. Petersen (eds.), *The Oxford Handbook of State and Local Government Finance* (New York: Oxford University Press, 2012), 45–82.

43 Jiri Jonas, *Great Recession and Fiscal Squeeze at U.S. Subnational Government Level* (Washington, DC: IMF, 2012).

44 This and much of the following relies mainly on Robin Boadway, “Canada,” in Anwar Shah (ed.), *The Practice of Fiscal Federalism: Comparative Perspectives* (Montreal: McGill-Queen’s University Press, 2007), 99–124.

approach to tax assignment came to be essentially the same as the American one. Canadian interpretation cheerfully ignored the standard distinction between direct and indirect taxes, with the consequence that the provinces "share with the federal government unrestricted access to all the major tax sources and are responsible for raising a high proportion of their own revenues."⁴⁵

What distinguishes the Canadian system is **tax harmonization** combined with flexible asymmetry.⁴⁶ Varying arrangements for tax harmonization exist for all three major revenue sources—personal income tax, corporate tax, and sales or value added tax—and they are all based on intergovernmental agreement with individual provinces.

In the case of income tax, participating provinces (all but Québec)⁴⁷ must abide by the federal tax base (i.e., the definition of taxable income under the federal *Income Tax Act*), but they can determine their own rates, brackets, and deductions. In turn, all income tax is collected by the Canada Revenue Agency at federal expense, and the provinces receive their share according to taxpayers' province of residence at the end of each fiscal year. A similar arrangement exists for corporate tax. In this instance, three provinces (Alberta, Ontario, and Québec) are not participating but have adopted similar tax bases to ensure all but harmonization.

There is more variety in the case of sales taxes. Since the adoption of a national value added tax—the Goods and Services Tax (GST)—by the federal government in 1991, some provinces have followed suit, others have retained a sales tax on goods, and one province (Alberta) has opted to have neither. Two partial harmonization agreements exist. One is a federal sales-tax harmonization agreement with three provinces (New Brunswick, Nova Scotia, and Newfoundland and Labrador) whereby the federal GST and provincial sales taxes have been replaced with a single value added tax, and provincial shares are determined on the basis of aggregate consumption estimates. The other is a bilateral agreement that harmonizes the federal GST with the Québec sales tax. In this case, Québec is the tax collector for both levels of government. Finally, in 2010, Ontario opted for a Harmonized Sales Tax (HST) of currently 13 per cent. Administered by the Canada Revenue Agency, it consists of a 5-per-cent federal part and an 8-per-cent provincial part.

These formal arrangements and informal practices show a commitment to cooperative coordination and a low propensity for tax competition. This

45 Boadway, "Canada," 99.

46 See Boadway, "Canada," 112–15.

47 See R. Lachance and F. Vaillancourt, "Quebec's Tax on Income: Evolution, Status, and Evaluation," in D.M. Brown (ed.), *Tax Competition and the Fiscal Union: Balancing Competition and Harmonization in Canada* (Kingston, ON: Institute of Intergovernmental Relations, Queen's University, 2001), 39–47.

commitment is also evident in the fact that property taxes are harmonized within and across all provinces. And it is most importantly apparent in the pragmatic way in which the federal government has conceded “tax room” to the provinces in line with the disproportionate rise of provincial program expenditure. While in the immediate postwar years the provinces were relegated to a more subordinate fiscal position, the repatriation of “tax points” to the provinces over the years has restored the balance.⁴⁸ As a result, primary tax revenues are split almost evenly between the two levels of government in Canada, and a modest amount is redistributed in the form of intergovernmental transfers. Canada is one of only two federations—the other is Switzerland—where the subnational governments (including the local level) raise over half the total tax revenue.

Spending Power Nevertheless

If the Americans pioneered modern federalism, the Canadians must at least be credited with inventing the federal spending power—not as a practice that exists in all federal systems, of course, but as an allegedly great menace threatening to push the provinces out of their existence. Unsurprisingly it was Québec taking the lead in making these accusations. According to Premier Maurice Duplessis in 1955, the uncontrolled use of the federal spending power would “reduce the provinces to legislative impotence.” Two decades later, Premier René Lévesque accused the imposition of the federal spending power upon the provinces in the name of nation-building of “deforming all their priorities.” And in 1998, Premier Lucien Bouchard put the blame for just about all that he thought ailed Canadian federalism on “a spending power that Québec has never wanted to recognize.”⁴⁹

This discontent with the federal spending power coincided roughly with the rising tide of separatism in Québec, but it did by no means fall on deaf ears in other provinces—with the exception of the so-called have-not provinces, mainly Atlantic Canada, which disproportionately depended on federal transfers. What is baffling from a comparative perspective is the intensity of hostile sentiments in a federation not remotely as dominated by conditional central handouts as the United States, where such sentiments are almost entirely absent. The most plausible explanation, of course, is that the idea of nation-building is inherently problematic in a federation with more than one nation.⁵⁰

48 The federal government reduces its basic tax rate so that provinces can raise theirs by an equivalent amount.

49 All cited in Secrétariat aux Affaires intergouvernementales canadiennes, *Québec's Historical Position on the Federal Spending Power 1944–1998* (Québec: Gouvernement du Québec, 1998).

50 Hanish Telford, “The Federal Spending Power in Canada: Nation-Building or Nation# Destroying?” *Publius* 33.1 (2003): 26.

The facts support Canada's troubled relationship with the federal spending power only in part. In order to aid the war effort, the provinces had entered into Tax Rental Agreements with the federal government during the Second World War. More by default than design, these agreements, whereby the provinces relinquished control over revenue in return for cash transfers, continued after the war. By the early 1960s, the provinces relied upon those cash transfers for almost one-quarter of their funding needs.⁵¹ The agreements had to be renegotiated every five years. Mounting resentment came from Québec, which reintroduced its own income tax in 1954, and Canada's richest and most populous province, Ontario, which had pressed for reform ever since the federal government had suggested making the provincial tax vacation permanent.

From the 1960s onward, as new national programs became established and at the same time fiscal pressures mounted on the national budget, a process began of reducing federal transfers in favour of restoring provincial tax room. By the time Bouchard singled out the federal spending power as the source of all evil, provincial reliance on cash transfers had been almost halved to 13 per cent of their total expenditures.⁵² Québec's discontent with the federal spending power, in other words, has been chiefly political. The federal government did use its spending power to "induce the provinces to introduce public health insurance and welfare programs," as a nation-building exercise in which it wanted to be seen as the leader.⁵³

Almost all of the remaining transfers today come in two packages. One is the entirely unconditional equalization grant, as discussed below. The other consists of two block grants: the Canada Health Transfer (CHT), earmarked for health care; and the Canada Social Transfer (CST), earmarked for welfare and post-secondary education. While conditions attached to these transfers are minimal, in the case of the CHT they are highly significant. As a condition of receiving health funding, each provincial health system must comply with the principles of Canada's universal health insurance scheme, Medicare. As spelled out in the *Canada Health Act*, these principles are public administration, comprehensiveness, universality, portability, and accessibility.⁵⁴ In the case of the CST, social assistance must be provided without minimum residency

51 Harvey Lazar, "In Search of a New Mission Statement for Canadian Fiscal Federalism," in H. Lazar (ed.), *Canada: The State of the Federation 1999-2000—Towards a New Mission Statement for Canadian Fiscal Federalism* (Kingston, ON: Institute of Intergovernmental Relations, Queen's University, 2000), 14.

52 Lazar, "In Search of a New Mission Statement," 14.

53 Boadway, "Canada," 119.

54 Antonia Maioni, "Health Care," in Herman Bakvis and Grace Skogstad (eds.), *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, 3rd ed. (Don Mills, ON: Oxford University Press, 2012), 165-82.

requirements.” Other than that, the provinces can spend the money as they see fit. Canada is “unique among federations in having so much of its intergovernmental transfers (about 94 per cent) consolidated into block payments.”⁵⁵

This predominance of block grants means that as a source of conflict between the two levels of government, conditionality has taken a back seat to adequacy. As in other federations, the temptation to transfer the pain of necessary budget economies to the subnational governments has been too great for central governments to resist,⁵⁷ and herein lies the real problem of the spending power: what can be given can also be taken away. Or it can be whittled away. Most national social programs were originally established as matching grant programs. This obviously required some degree of cooperation and commitment. When the provinces sought more policy autonomy, and the federal government more fiscal discretion, cost sharing came to an end in 1977. From then on, consecutive federal governments found ever more ways of reducing overall transfers, with the most painful cuts administered in the mid-1990s.

In sharp contrast to the United States, however, the federal spending power in Canada has not played the role of making a “mockery of the constitutional division of powers”—a possibility we had noted at the outset of this chapter. The Canadian case instead points to the inherently ambiguous role of the federal spending power precisely when the ultimate goal is the maintenance of federal balance. On the one hand, federal spending has served the legitimate objective of Canadian nation-building. This is what Québec governments have objected to.⁵⁸ On the other hand, it has doubtlessly supported the provinces’ positions as largely autonomous providers of public services that Canadians care for most. As we will see particularly in the next section, Québec has been a main beneficiary of this help.

The Equalization Compromise

A commitment to ameliorate inequality across provinces had been part of the original federal bargain. The roots of Canada’s first stand-alone equalization program in 1957 therefore “can be found in formal and informal arrangements in the ninety years prior to its implementation.”⁵⁹ Its eventual formal adoption

55 See Karine Richer, *The Federal Spending Power* (Ottawa: Library of Parliament, 2007).

56 Brown, “Fiscal Federalism,” 63.

57 See for example, Advisory Panel on Fiscal Imbalance, *Reconciling the Irreconcilable: Addressing Canada’s Fiscal Imbalance* (Ottawa: Council of the Federation, 2006), 18–19; Commission sur le déséquilibre fiscal, *Pour un nouveau partage des moyens financiers au Canada* [A New Division of Canada’s Financial Resources] (Québec: Gouvernement du Québec, 2002).

58 Daniel Béland and André Lecours, *Nationalism and Social Policy: The Politics of Territorial Solidarity* (Oxford: Oxford University Press, 2008).

59 P.E. Bryden, “The Obligations of Federalism: Ontario and the Origins of Equalization,” in P.E. Bryden and Dimitry Anastakis (eds.), *Framing Canadian Federalism: Historical Essays in Honour of John T. Saywell* (Toronto: University of Toronto Press, 2009), 76.

by the federal government was a response to a combination of political pressures: compensation for revenue loss resulting from changes to the formula of the still-existing Tax Rental Agreements particularly for the poorer provinces; an accommodation if not containment strategy for rising autonomist sentiments in Québec; and a response to Ontario's competing aspirations as the nation's principal benefactor.⁶⁰

In principle, one could have thought of a limited set of options for a formal scheme of equalization: the per-capita fiscal capacity of all provinces could have been brought up to that of the richest province, Ontario; but this was out of the question as it would have placed an unsustainable burden on federal finances. The fiscal capacity of all provinces could have been adjusted to a national average; but this was equally out of the question as it would have required the capacity of the richer provinces to be lowered by means of direct horizontal transfers. Finally, there was a compromise option whereby the federal government would bring the poorer provinces up to a national average without bringing the richer ones down; this was the chosen course of action.

The formula adopted in 1957 was changed several times over the years, but its basic approach essentially remained the same: entirely funded by the federal government, only provinces below the national average receive cash transfers bringing them up to that average; the average is calculated on the basis of per-capita tax capacity taken from originally 3, and now 33, revenue sources across the provinces.⁶¹ This compromise approach was reflected in the wording of the equalization clause enshrined in the constitution in 1982:

Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation. (Section 36[2])

Controversy surrounding Canada's equalization program and formula has continued nevertheless. For a number of reasons, its large population base, and a lower level of property tax revenue, Québec qualifies for almost half of all equalization funds.⁶² While this largesse has not silenced Québec's demands for more fiscal autonomy, if not outright sovereignty,⁶³ equalization is nevertheless

⁶⁰ See Bryden, "Obligations of Federalism"; Daniel Béland and André Lecours, "Accommodation and the Politics of Fiscal Equalization in Multinational States: the case of Canada," *Nations and Nationalism* 20.2 (2014): 337–54.

⁶¹ Between 1982 and 2004, only five "average" provinces were included in the calculation, excluding the poor Atlantic provinces and oil-rich Alberta.

⁶² 2013–14 fiscal year: Édison Roy-César, *Canada's Equalization Formula* (Ottawa: Library of Parliament, 2013).

⁶³ See Béland and Lecours, "Accommodation and the Politics of Fiscal Equalization."

perceived by some in the rest of the country, particularly in the West, as a response to separatist blackmail.

A particularly tricky issue is the uneven distribution of natural resources across the country. Rents or “royalties” provide enormous fiscal capacity advantages to resource-rich provinces and, if taken fully into consideration, might elevate the national average to unaffordable levels for federal equalization. It is for this reason that Alberta, along with the four poorest provinces, was excluded from the formula during the 1982–2004 period. Currently, with all ten provinces included, only half of resource revenues are taken into account: another compromise equalizing fiscal capacity up to a national average calculated at a lower level, while leaving resource-rich provinces with considerable advantage. Thus the oil-rich province of Alberta has been able to retain its windfall resource rents and use those to provide high-quality public services, pay off debt, and accumulate substantial sovereign wealth fund savings.⁶⁴ When the oil price is high, this puts Alberta in a privileged position indeed.

A recent reversal of fortunes has fuelled some new controversies. On the one hand, Ontario became a “have-not” province for the first time in 2009. The provincial government immediately began to complain that the strict per-capita plus GDP-linked growth-cap formula adopted by the federal government at that time did not give the province its fair share. Only a year earlier, when it still found itself on the “have” side, the provincial government had supported the formula change.

On the other hand, offshore oil and gas discoveries during the 1980s provided the traditional “have-not” provinces of Nova Scotia and Newfoundland and Labrador with a source of sudden resource wealth. Immediately again, complaints were voiced by their governments about impending reductions in equalization payments. In this instance, the federal government chose to accommodate both provinces with long-term transitional “offshore accords” that offered additional cash equivalent to lost equalization funds. In some quarters, this was seen as a wholesale abrogation of Canada’s universal equalization scheme, long since regarded, in the words of Nova Scotia premier Jon Hamm, as “the glue that holds the federation together.”⁶⁵ Others saw it as part of a general trend of Canadian federalism to move from intergovernmental multilateralism to a less onerous yet fragmenting regime of bilateralism resembling “relations between independent countries.”⁶⁶

Equalization amounts to only about a third of the federal government’s transfer payments to the provinces. For the provinces, equalization transfers

64 André Plourde, “Canada,” in George Anderson (ed.), *Oil and Gas in Federal Systems* (Don Mills, ON: Oxford University Press, 2012), 88–120.

65 Cited in Bryden, “Obligations of Federalism,” 76.

66 Rodden, *Hamilton’s Paradox*, 238.

have made up roughly between 7 per cent (Québec) and 20 per cent (Prince Edward Island) of their revenue. While these numbers are by no means trivial, they hardly explain in full the intense debate that has accompanied equalization ever since its inception. This debate can only be explained politically: for the federal government, equalization is a constitutional obligation limiting its sovereign use of the spending power; for the recipient provinces in English Canada, equalization is an entitlement that came with the original federal compact. For federalists in Québec believing in the *existence* of a distinct nation, it is what Premier Robert Bourassa famously called *féderalisme rentable* ("profitable federalism").⁶⁷ For separatists believing in the *creation* of a distinct country, it is a ploy to buy back francophone loyalty.

Debt and Future Liabilities

Along with American states and Swiss cantons, Canadian provinces enjoy the highest level of "autonomous subnational revenue authority" across federations.⁶⁸ They are as free to spend and borrow as the federal government. Governments at both levels have routinely run budget deficits. A notable exception has been the federal government's budgetary surpluses between 1997 and 2008, which were made possible by drastic transfer cuts administered in the face of what was presented as a looming federal debt crisis. These cuts came to an end when the world financial crisis hit and required extraordinary stabilization measures.

In the absence of formal balanced-budget requirements, the provinces have for the most part borrowed responsibly. A provincial bailout has not occurred since the Great Depression—although additional federal cash has come to the rescue on occasion. The aforementioned "off-shore accords" with Nova Scotia and Newfoundland and Labrador, for instance, were given justification in reference to the persisting debt levels in these provinces. While provincial ratios of debt to Gross Provincial Product (GPP) vary from roughly 24 per cent (Manitoba) to 50 per cent (Québec), with some of the resource-rich provinces approaching zero or even showing a surplus,⁶⁹ the ratio of the federal government peaked at over 70 per cent during the mid-1990s before being brought down to around 35 per cent in 2012–13.⁷⁰ The reduction of the federal debt-to-GDP ratio was in large part made possible by drastic and mostly unilateral transfer cuts administered in the 1993–94 and 2000–01 fiscal periods.

67 Cited in Béland and Lecours, "Accommodation and the Politics of Fiscal Equalization," 345.

68 Rodden, *Hamilton's Paradox*, 31.

69 Marc Joffe, *Provincial Solvency and Federal Obligations* (Ottawa: Macdonald Laurier Institute, 2012), 10.

70 *Annual Financial Report of the Government of Canada* (Ottawa: Department of Finance, Fiscal Year 2012–2013).

Provincial governments saw this not so much as federal fiscal prudence to be boasted about, but rather as an effective transferral of “part of the federal debt onto the provinces.”⁷¹

Fiscal Equitability in Germany

As we just saw, there is only a limited constitutional commitment to equalize fiscal capacity in Canada. The German Basic Law requires something much more demanding: the “equality of living conditions” for all Germans (see Chapters 6 and 9). German fiscal federalism has therefore evolved in a much more interlocking way that includes tax sharing, a system of horizontal fiscal equalization that takes from the rich and gives to the poor, and an obligation for fiscal bail-outs. At the same time, the use of the federal spending power is as a matter of principle limited to areas of exclusive federal jurisdiction.

Tax Sharing

When the Germans set out to redesign a democratic federal system after the Second World War, they sought to extend the core principles of “divided and shared rule” to fiscal federalism in a rather distinctive way. On the one hand, they separated revenue sources according to “divided rule”: while the turnover tax was assigned exclusively to the federal level, income and corporate tax fell exclusively to the *Länder*. On the other hand, according to “shared rule,” the legislative power over taxation was assigned entirely to the federal level (where, it must not be forgotten, tax laws would require approval by *Länder* government delegates in the *Bundesrat*).⁷²

By 1955, it had become apparent that this separation of revenue sources with very different yield potentials was unable to cope with economic development and proportionality requirements. A first fiscal reform therefore reorganized income and corporate taxes as shared taxes, whereas the turnover tax remained in the exclusive domain of the federal level. A much more thorough fiscal reform in 1969 not only extended tax sharing to the turnover tax but also established the “joint tasks” (see Chapters 6 and 10), as well as provisions for jointly financed investment projects in exception to the general prohibition of “mixed financing” (*Mischfinanzierung*; see below).

The Basic Law first identifies income, corporate, and turnover taxes as **joint taxes** (*Gemeinschaftssteuern*). It then assigns income and corporate taxes “equally” to the federal and *Länder* levels. (Article 106[3]). With regard to the turnover tax, which is a value added tax (VAT), the Basic Law provides a more flexible approach:

71 Boadway, “Canada,” 116–17.

72 This and most of the following is drawn from Heinz Laufer and Ursula Münch, *Das föderative System der Bundesrepublik Deutschland* (Opladen: Leske + Budrich, 1998), 209–22.

the apportionment has to be determined and periodically adjusted according to principles of proportionality by federal legislation requiring *Bundesrat* approval (Article 106[3–4]). Finally, local governments receive a portion of income and turnover taxes likewise to be determined by federal legislation with bicameral approval (Article 106[5–5a]).

After the *Länder* have collected all joint taxes, the first step is “pre-subtraction” (*Vorabzug*) of the local government portions, currently 15 per cent of the income tax and 2 per cent of the VAT. Corporate tax and the remaining amount of income tax are then split between the federation and the *Länder*. In the case of the VAT, the remaining amount is divided according to a distribution ratio that typically has to be renegotiated in the bicameral legislature every two years. The current ratio is 53 per cent (federation) and 45 per cent (*Länder*).

The overall result is a very high level of tax harmonization.⁷³ About 70 per cent of federal and 85 per cent of *Länder* tax revenue comes from joint taxes. For these, neither level of government can autonomously determine the tax base or tax rates because this requires federal legislation with bicameral approval. Technically, this means that both levels of government have very limited access to own-source revenue, a fact that is blamed for fiscal gaps and rising debt levels (see below). From a comparative perspective, however, the vertical fiscal gap is low, and so is the need for transfers.⁷⁴ It is also far from clear whether more autonomy would lead to more proportionality, presumably through tax competition, and whether such competition would be desirable or even politically feasible.

Spending Power Constrained

The Basic Law’s prohibition against “mixed financing” means that the federal government cannot co-finance programs or projects assigned to *Länder* jurisdiction or administration. It also means implicitly that the federal government cannot pass legislation imposing costs on the *Länder*.⁷⁵ Both prohibitions must be understood in the context of Germany’s system of administrative federalism whereby the *Länder* execute and administer most federal laws “in their own right” (Article 83). Expenditures for this administration, in other words, do not constitute imposed costs but instead are considered part of the *Länder*’s

73 See Lars P. Feld and Jürgen von Hagen, “Federal Republic of Germany,” in Anwar Shah (ed.), *The Practice of Fiscal Federalism: Comparative Perspectives* (Montreal: McGill Queen’s University Press, 2007), 125–50.

74 Richard M. Bird and Andrey V. Tarasov, “Closing the Gap: Fiscal Imbalances and Intergovernmental Transfers in Developed Federations,” *Environment and Planning C: Government and Policy* 22.1 (2004): 85.

75 On this and the following, see again Laufer and Münch, *Das föderative System*, 200–03.

autonomous task assignment, for which additional federal funding is precluded (Article 104a[1]).

There are exceptions, however. The *Länder* can be asked to administer federal laws “on commission” (e.g., maintenance and administration of federal highways). In this case, the federation has to provide the funds and in return can mandate general rules and instructions (Article 85, 104a[2]). The federation may also provide funds “wholly or in part” in the case of laws providing “money grants” (e.g., student loans) to be administered by the *Länder* (Article 104a[3]).

Most importantly, the federation can grant financial aid to the *Länder* for “particularly important investments” undertaken by the *Länder* or local governments when these are deemed “necessary to avert a disturbance of the overall economic equilibrium”; to equalize “differing economic capacities across the federation”; or to “promote economic growth” (Article 104b[1]). Examples are public transportation, urban development, social housing or, more broadly, financial aid for the infrastructural modernization of the East German *Länder*. While this sounds like a big and open gate for federal intrusion analogous to the American “necessary and proper” clause, it is in reality a much smaller door with a triple protection mechanism: investment projects of this kind must be time limited and periodized with diminishing annual allotments; they require a federal law with bicameral approval, or must be based on “inter-administrative agreement” under the Federal Budget Law; and all funds, including those earmarked for the local level of government, must go to the *Länder*, which are then in charge of further distribution. Taken together, these give German fiscal federalism a very balanced and cooperative character with a strongly protected role for the *Länder*.

Equalization without Compromise

Mindful of the Basic Law’s “eternity clause” (Article 20), according to which Germany’s foundation as a democratic and *social* federal state would not be open to constitutional amendment (see Chapter 10), one might well understand the entire system of German fiscal federalism as subservient to the goal of equalization.

The core of what Germans mean when they refer to “fiscal equalization of the *Länder*” (*Länderfinanzausgleich*) is a two-step process laid down in Article 107(2) of the Basic Law: “adequate equalization” by direct horizontal transfers from the rich to the poor *Länder*, and a final topping up through vertical supplementary transfers by the federal government. On this constitutional basis, a federal equalization law (*Finanzausgleichsgesetz*, FAG), obviously requiring *Bundesrat* approval again, has to provide the details.⁷⁶ Adjustment payments are then taken

76 All information is taken from the Federal Ministry of Finance website at www.bundesfinanzministerium.de.

from the above-average *Länder* and redistributed to the below-average *Länder*. The formula employed is designed on a progressive scale in such a way as to ensure that not all marginal revenue is taken,⁷⁷ that no *Land* will fall below the average, and that all *Länder* end up with at least 95 per cent of average per-capita fiscal capacity. Supplementary vertical grants finally top this capacity up to 97.5 per cent.

After reunification, additional measures had to be adopted for economic and fiscal stabilization of the new East German *Länder* including Berlin, which receive additional special-need grants for infrastructural development, structural unemployment, and disproportionately low municipal fiscal capacity. And finally, all small and poor *Länder* receive grants in compensation for their higher per-capita administrative costs. Under the so-called Solidarity Pact, most of these measures are co-financed by intergovernmental agreement between the federal government and the *Länder*.

The picture that emerges from these provisions is one of an almost uncompromising commitment to equalization in the name of social solidarity. For the poor *Länder* in the east, however, the ambitious goal of equal living conditions is still a very distant one, and will probably remain so for several more generations: fiscal equalization is very different from economic equalization. For the rich *Länder* in the west, it is an increasingly resented fiscal burden compounded by the fact that only three *Länder*—Bavaria, Baden-Württemberg, and Hesse—have remained as “donors” under the current fiscal equalization formula. An increasingly bitter dispute has flared up ever since the equalization formula was more or less extended to the new and poor eastern *Länder*. In 1998, Bavaria, Baden-Württemberg and Hesse, already the largest “donors” in the system but not yet the only ones, launched a concrete norm-control procedure in the Federal Constitutional Court (see Chapter 11) arguing that the FAG no longer fulfilled the intended meaning of “adequate equalization” under Article 107(2) of the Basic Law. In a remarkable decision, the Constitutional Court concurred insofar as it held that the purpose of equalization is to “diminish but not to level” fiscal disparity. But then it allowed the existing FAG to remain in effect as a “transitory” provision until the end of 2004—but only so if the legislature (i.e., *Bundestag* and *Bundesrat*) had decided upon a more adequate equalization formula by the end of 2002.⁷⁸

A key complaint had been that excessive equalization is a disincentive for successful economic policy in the donor *Länder* because almost all additional revenue is siphoned off to the “taker” *Länder*. The new FAG duly adopted in 2001 therefore contained an incentive-oriented provision whereby 12 per cent of above-average tax-yield increases are excluded from the equalization calculation.

⁷⁷ See Feld and Hagen, “Federal Republic of Germany,” 144.

⁷⁸ BVerfG, 2 BvF 2/98 (11 November 1999), 292

Yet this modest concession to the donor *Länder* has by no means ended the dispute. Bavaria and Hesse have gone to court again; the current FAG will expire in 2019; agreement on anything that might pass the bicameral legislative hurdle is nowhere in sight. German fiscal federalism will be confronted with the very difficult task of finding, in the words of Germany's highest court, a new "balance" between "autonomous statehood" (*Eigenstaatlichkeit*) of the *Länder*, and the federal principle of "mutual solidarity" (*Solidargemeinschaft*).⁷⁹

A Brake on the Debt Crisis

It may come as a surprise, but of all cases wealthy Germany is widely considered to be in a public debt crisis—most of which is blamed on reckless fiscal behaviour by the *Länder*: "The *Länder* are the largest subnational debtors in Europe and the central government has been powerless to restrict their borrowing."⁸⁰ It is not a crisis that can be blamed on the costs incurred from reunification, because it began earlier, with two western *Länder*, Saarland and Bremen, coming close to insolvency during the mid-1980s. They were eventually bailed out with conditional grants after the Constitutional Court had ruled, in 1992, that the federal government was obliged to do so under the solidarity obligation of the Basic Law. A decade later, Berlin threatened to sue the federal government for a fiscal bailout, Saarland and Bremen did so yet again, and several more *Länder* were expected to follow suit.⁸¹

The German *Länder* are not any freer to spend and borrow than American states or Canadian provinces. Nor are debt levels particularly high.⁸² The key difference is Germany's system of integrated federalism: via the *Bundesrat*, the *Länder* can act as veto players in all legislation affecting their interests. They simply do not have to be particularly worried about federal sanctions for irresponsible fiscal behaviour. In other words, they can count on fiscal help in some form or other and thus contribute to an "overgrazing of the fiscal commons."⁸³ The other reason has to do with the tax-sharing system. With no autonomous control over tax bases or rates for the largest portion of their revenue, borrowing is the "instrument of choice" for the *Länder*.⁸⁴ The prevailing regime of tax

79 BVerfG, 2 BvF 2/98 (11 November 1999), 292.

80 Rodden, *Hamilton's Paradox*, 155.

81 On the whole see Feld and Hagen, "Federal Republic of Germany," 126–27; and Rodden, *Hamilton's Paradox*, 163–66.

82 Rodden, *Hamilton's Paradox*, 186.

83 Philip Manow, "Germany: Co-operative Federalism and the Overgrazing of the Fiscal Commons," in Herbert Obinger, Stephan Leibfried, and Francis G. Castles (eds.), *Federalism and the Welfare State: New World and European Experiences* (Cambridge: Cambridge University Press, 2005), 222–62.

84 Feld and Hagen, "Federal Republic of Germany," 139.

sharing as a reason for debt accumulation suggests that the reliable and predictable flow of cash creates a sense of security that in turn lowers the threshold of fiscal prudence.

Enter the *Schuldenbremse* (debt brake), already touted as a new German contribution to the English language alongside *kindergarten*.⁸⁵ An agreement reached in 2009 consisted of three components.⁸⁶ First, additional net borrowing shall be limited to 0.35 per cent of GDP for the federation from 2016 onward, and entirely prohibited for the *Länder* by 2020; still existing structural deficits have to be eliminated by then. Second, further deficits are permissible during economic downturns but shall be balanced by surplus during periods of economic upturn. Third, supplementary debt can be taken on during times of unforeseeable economic and fiscal crisis. An intergovernmental Stability Council shall be established as a control mechanism for the “continuing supervision of budgetary management” at both levels of government. The deal was sweetened for the fiscally weak *Länder* by additional consolidation grants, and in return Bremen and Saarland agreed to retract their bailout suits before the Constitutional Court. Of course, as one commentator dryly remarked, the provisions will only take effect in 2016 and 2020, respectively, and by then most of the political leaders “may no longer be around to make the difficult decisions.”⁸⁷

Incomplete Fiscal Union in the EU

While almost everything about public finance in the European Union is different yet again, there are still enough similarities to allow a systematic comparison with conventional federations. As we just saw in the preceding sections, one of the key variables in assessing fiscal federalism is the extent to which central governments are able to use their generally superior revenue-raising capacities as a spending power with significant and sometimes overwhelming impact upon subnational autonomy. The EU possesses neither an independent power to tax nor a significant power to spend, and therefore it resembles more of a regulatory regime than a central government capable of agenda-setting initiatives.⁸⁸ Yet a major incentive for joining the original Community, especially for the Mediterranean countries, was to become beneficiaries of spending programs

85 “Tie Your Hands, Please,” *The Economist* (10 December 2011); the term was actually first used in Switzerland.

86 Sabine Kropp, *Kooperativer Föderalismus und Politikverflechtung* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2010), 330–31; see Article 109a (new) and Article 115 (amended).

87 Kropp, *Kooperativer Föderalismus*, 232.

88 See Giandomenico Majone, “Regulatory Legitimacy in the United States and the European Union,” in Kalypso Nicolaidis and Robert Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (New York: Oxford University Press, 2006), 253.

in agriculture and regional development. These programs also can be regarded as equivalent to an equalization commitment, and, like the fiscal equalization systems in the cases discussed so far, they have been criticized as creating an entitlement culture preventing necessary economic adjustment. Finally, even though economic and monetary union is “incomplete,” as the EU does not have its own taxing and spending powers, and fiscal policies “remain in the hands of national governments,”⁸⁹ the unfolding of the European financial and bailout crisis showed remarkably similar characteristics to those just described in the German case. Indeed, the comparison might suggest that federal systems unable to restrain subnational spending and borrowing inevitably remain similarly incomplete.

Funding Arrangements

The way in which the process of European integration moved from a customs union and common market to a full-fledged economic and monetary union (EMU) echoes the process whereby the *Zollverein* led the way to German political integration in the nineteenth century.⁹⁰ From the very beginning, the logic of this process was reflected in the way it was to be funded. One of the first financial measures of the original Community of Six also was one of its most controversial ones. The system set up was not just a customs union, but one in which levies on agricultural imports would be used to subsidize agricultural exports. The levies kept agricultural prices in the Community above world-market levels, and the subsidies stabilized the incomes of those exporting to cheaper international markets. The system particularly discriminated against Third World producers for whom agriculture was the main or only source of income, and it led to massive domestic overproduction (“butter mountains”). Only in the case of sugar products, which did not enjoy the same degree of massive lobbying pressure as cereals, for example, were domestic levies imposed in order to curb overproduction.

Funding for the general budget originally came from national contributions based on the member states’ GDP. From 1970 onward, this system was progressively replaced by three funding components officially called **own resources**.⁹¹ These are: 1) the “traditional” own resources comprising customs duties and sugar levies, making up about 13 per cent of the budget; 2) a uniform 0.3-per-cent rate levied on the harmonized VAT base of each member state,

89 Amy Verdun, “Economic and Monetary Union,” in Michelle Cini and Nieves Pérez-Solórzano Borragán (eds.), *European Union Politics*, 4th ed. (Oxford: Oxford University Press, 2013), 306.

90 Walter Mattli, *The Logic of Regional Integration: Europe and Beyond* (Cambridge: Cambridge University Press, 1999).

91 European Commission, “The EU’s Own Resources,” at http://ec.europa.eu/budget/miff/resources/index_en.cfm; John McCormick, *Understanding the European Union: A Concise Introduction*, 6th ed. (Basingstoke, UK: Palgrave Macmillan, 2014), 141.

accounting for about 12 per cent of the budget; and 3) a standard percentage of each member state's Gross National Income (GNI),⁹² making up over 70 per cent of the budget.

Overall, there are two features of EU funding that stand out in sharp contrast to all other systems of fiscal federalism. One is the minuscule size of the budget, which is currently fixed at a maximum of 1.23 per cent of Union GNI. In absolute terms, the EU spends about €140 billion per year, which is roughly equivalent to what the UK spends on its National Health Service alone.⁹³ The other is the requirement for a balanced budget. The Council of Ministers and the European Parliament have to agree on matching numbers for funding and expenditures; there are no deficits. In fact, as already mentioned, there usually is a surplus. The fiscal instruments for macroeconomic management thus remain entirely in the hands of the member-state governments.

The EU nonetheless exercises a considerable degree of fiscal power. The bulk of the money is spent on a very few large items, notably agricultural policy and cohesion policy (regional development). The transfers to individual member states under these headings are substantial, at least for some—almost three per cent of GNI in the case of Lithuania, for instance.⁹⁴ By comparison with conventional federations, however, the EU's own spending is minimal. As a "regulatory regime" (see above) or, in our terms, a particular case of administrative federalism, the EU law sets policy goals but leaves policy implementation and administration almost entirely to the member states.

Bipolar Spending Habits

Political compromise explains the EU's bipolar spending focus on agriculture and regional development.⁹⁵ In 1958, Germany and France entered the Community of Six under very different circumstances. While Germany already was Europe's economic powerhouse once again, France lagged far behind and was stuck with a large agricultural sector. If France's political purpose in the earlier European Coal and Steel Community (ECSC) had been that reindustrialization of its

⁹² GNI is GDP plus member state income from foreign income, and minus foreign income within the member state.

⁹³ Michelle Cini and Nieves Pérez-Solórzano Borragán, "Introduction," in Michelle Cini and Nieves Pérez-Solórzano Borragán (eds.), *European Union Politics*, 4th ed. (Oxford: Oxford University Press, 2013), 5.

⁹⁴ Brigid Laffan and Johannes Lindner, "The Budget: Who Gets What, When, and How," in Helen Wallace, Mark A. Pollack, and Alasdair R. Young (eds.), *Policy-Making in the European Union*, 6th ed. (New York: Oxford University Press, 2010), 209.

⁹⁵ See Marco Buti and Daniele Franco, *Fiscal Policy in Economic and Monetary Union: Theory, Evidence, and Institutions* (Cheltenham, UK: Edward Elgar, 2005), 211.

former German foe would not lead to remilitarization, a prime goal of the Common Market now was to have German industrial might subsidize French agriculture—almost as a substitute for war reparations, which were out of the question in consideration of the disastrously destabilizing consequences they had caused after the First World War. This explains why the Common Agricultural Policy (CAP) became the first important pole of Community spending.⁹⁶ The accession of Spain and Portugal, another two structurally weak member states with large agricultural sectors, raised fears that the single market would ever more split Europeans into winners and losers. This explains why redistributive cohesion and regional development policies⁹⁷ under the 1985 *Single European Act* (SEA) became the second pole of Community spending.

And so it has remained ever since: roughly 29 per cent of EU budgets is spent on agriculture, and 47 per cent on cohesion and regional development.⁹⁸ Based as they are on historical compromises in a rather distant past, commentators have criticized the continued budgetary dominance of these two spending poles.⁹⁹ While CAP is seen as a sinecure sustained by the Council's "clientelist relationship with farmers,"¹⁰⁰ the qualification of all member states, rich or poor, for regional development funds has been questioned as inefficient and unnecessary.¹⁰¹

In Lieu of Equalization

There is no European fiscal equalization program aimed at comparable public-service delivery in other federal systems. Like the designers of those other systems, however, those driving forward the integration process were aware of problems that would arise from a lasting division of winners and losers in a common market. Both CAP and the cohesion and regional development policies were designed with the goal of alleviating social and regional inequality.

In the case of CAP, the rationale was not just subsidizing French farmers with German industrial money. There also was genuine concern about the stability—and acceptance—of a common project aimed at peace and prosperity if there was to remain a significant disparity between incomes derived from industrial as

96 Another reason was the well-organized German agricultural sector and its traditional support for the governing conservatives.

97 Contrary to regional development funds, cohesion funds are allocated at the member state level (see below).

98 McCormick, *Understanding the European Union*, 143.

99 Buti and Franco, *Fiscal Policy*, 211.

100 Laffan and Lindner, "The Budget," 214.

101 See David Allen, "The Structural Funds and Cohesion Policy: Extending the Bargain to Meet New Challenges," in Helen Wallace, Mark A. Pollack, and Alasdair Young (eds.), *Policy-Making in the European Union* (Oxford: Oxford University Press, 2010), 230–31.

compared to agricultural sectors of the economy. If the intention had merit, its execution was deeply flawed. Not only did price guarantees lead to overproduction, but they also rewarded efficiency, with the result that rich farmers in the north received far more funds than poor farmers in the south.

Despite a particularly well-organized agricultural lobby supported by national vested interests, CAP has undergone various rounds of reform.¹⁰² Open-ended price support became limited by the introduction of production quotas; support was more directly geared toward rural development; payments became conditional upon meeting environmental standards; and product-related price support was entirely replaced by direct single-farm payments. CAP, in other words, has become a much broader approach to agricultural policy management. Whether it actually equalizes anything by shifting money to agriculture from other sectors of the European economy very much remains an open question. Cohesion and regional development policy in the EU is in turn financed by the so-called Structural Funds.¹⁰³ Payments under the so-called Cohesion Fund are limited to environmental and transport infrastructure. They go to member states with a GDP below 90 per cent of the EU average, so long as they are in compliance with the 3-per-cent-of-GDP debt rule under the European Stability and Growth Pact.

The usefulness or even fairness of these support programs in lieu of equalization is widely disputed, and even the Commission administering them "struggles to find clear evidence that structural funding enhances EU cohesion."¹⁰⁴ Germany, for instance, by far the largest budget contributor, is also the fourth largest recipient of funds.¹⁰⁵ And since access to regional development money increasingly requires regional initiative and application, it is often the poorest and most deserving regions that lose out because they lack the institutional and administrative capacity to be successful. However, the funds are here to stay, as they are one of the main attractions of EU membership.¹⁰⁶ As in the case of CAP, further reform efforts will have to aim at giving them broader appeal and purpose.

The Euro Crisis

Up until 2002, the member states of the European Union not only controlled their own fiscal policy, but each had their own currency. The EU was a single

102 On the whole see Christilla Roederer-Rynning, "The Common Agricultural Policy: The Fortress Challenged," in Helen Wallace, Mark A. Pollack, and Alasdair Young (eds.), *Policy-Making in the European Union*, 6th ed. (Oxford: Oxford University Press, 2010), 181–205.

103 See Allen, "The Structural Funds," 232.

104 Allen, "The Structural Funds," 249.

105 Structural Funds and CAP combined; see McCormick, *Understanding the European Union*, 141.

106 Allen, "The Structural Funds," 251.

market but not a single economy. On 1 January 2002, this changed, as the European Monetary Union (EMU) came into effect and the Euro became the legal tender of all participating member states. It was a momentous step, creating “without doubt the most spectacular and ambitious monetary union of all time.”¹⁰⁷ The single currency provides an enormous convenience to businesses and consumers, but, since monetary policy and fiscal policy have direct implications upon each other, the currency union was always going to create policy problems. In particular, depreciation or appreciation of the national currency is an essential way in which countries adjust to their changing competitiveness. Economists had long warned that adopting a single currency would be unwise until Europe was effectively a single economy with full mobility of capital and labour.¹⁰⁸ Arrangements like the Euro “facilitate business and communication in good times but intensify problems when times are bad”¹⁰⁹—as has been acknowledged in retrospect by one of the system’s leading architects.¹¹⁰ By contrast with this “lopsided design,” other federations tended to develop in reverse order—fiscal union then monetary union—or simultaneously.¹¹¹

Weaknesses of this arrangement were exposed drastically with the global financial crisis of 2008–09, when a “debt crisis” spread from some member states through the banking system. A lot has been made of this crisis, and some have even speculated that it might give pause to rethink the entire direction of the integration project.¹¹² Yet in one way, from a comparative federalism perspective, there is little cause to see this crisis as any different from the debt crisis we just described in the case of Germany: national governments in federal systems do not usually control spending and borrowing in subnational member units. In another way, of course, there is much that is very different indeed.

107 Verdun, “Economic and Monetary Union,” 297.

108 Robert A. Mundell, “A Theory of Optimum Currency Areas,” *American Economic Review* 51.4 (1961): 657–65; Martin Feldstein, “Europe’s Monetary Union: The Case against the Euro,” *The Economist* 323.7763 (13 June 1992): 19–23.

109 Barry J. Eichengreen and Peter Temin, “Fetters of Gold and Paper,” *Oxford Review of Economic Policy* 26.3 (2010): 370. Also see Martin Feldstein, “The Failure of the Euro: The Little Currency that Couldn’t,” *Foreign Affairs* 91.1 (2012): 105–16.

110 Jacques Delors, “Economic Governance in the European Union: Past, Present and Future,” *Journal of Common Market Studies* 51.2 (2013): 169–78.

111 Nicolas Jabko, “The Politics of Central Banking in the United States and in the European Union,” in Anand Menon and Martin Schain (eds.), *Comparative Federalism: The European Union and the United States in Comparative Perspective* (New York: Oxford University Press, 2006), 284; also see Andrew Moravcsik, “Europe after the Crisis: How to Sustain a Common Currency,” *Foreign Affairs* 91.3 (2012): 54–68.

112 See Giandomenico Majone, *Rethinking Union of Europe Post-Crisis: Has Integration Gone too Far?* (Cambridge: Cambridge University Press, 2014).

There are immediately two main differences. One is that the crisis is a Euro-zone crisis, which means that it affects only the 18 (of 28) member states that have adopted the Euro as their common currency by qualifying under the so-called Maastricht convergence criteria: budget deficits below 3 per cent, and public debt below 60 per cent of GDP. The other difference is that the EU itself is not in debt, and it cannot under the Treaties take on debt by bailing out member states. Only the member states can do that by means of agreement at the political leadership level.

Idiosyncratic components of the Euro-zone debt crisis have to be distinguished from systemic ones. Greece, which triggered the crisis, had essentially gained entry into the Euro-zone by fraud, using “creative accounting and inaccurate statistics” to qualify under the Maastricht convergence criteria.¹¹³ When the real numbers were revealed in the wake of the global crisis, bond markets reacted with an interest-rate hike that put Greece on the brink of default. What is systemic in comparison with mature federal systems, however, is the disjuncture between fiscal and monetary policy. As we noted above, the EMU is an awkward halfway house in European economic integration: the European Central Bank (ECB) “decides monetary policies for the entire Euro area, yet there is no equivalent supranational economic institution that sets economic policies for that same area.” Fiscal and budgetary policies remain under member-state control.¹¹⁴

One consequence of this is that, despite a common currency, financial markets continue to react to member-state deficits and debt individually. The EU with its limited budgetary powers cannot provide a protective shield against a sudden decline in bond ratings in the same way that the German federal government can in the case of *Länder* debt. As a result, Germany’s bond rate is nearly half of what it is even in France, for example.¹¹⁵ One other adverse consequence of this disjuncture is that “tax competition is stronger in the EU than in the rest of the world.”¹¹⁶ As we noted above, decentralized taxation means tax competition between jurisdictions as businesses pressure governments into treating them more leniently. This is accentuated in the EU because single-market rules constrain how member states can tax, while the EU’s decision-making processes make coordination of national tax systems very difficult.

The EU Euro-zone finds itself under enormous economic, fiscal, and credibility pressure. The European Stability and Growth Pact (SGP) has obviously

113 George Ross, *The European Union and Its Crises: Through the Eyes of the Brussels Elite* (Basingstoke, UK: Palgrave Macmillan, 2010), 148.

114 Verdun, “Economic and Monetary Union,” 306.

115 Delors, “Economic Governance in the European Union,” 176.

116 Philipp Genschel, Achim Kemmerling, and Eric Seils, “Accelerating Downhill: How the EU Shapes Corporate Tax Competition in the Single Market,” *Journal of Common Market Studies* 49.3 (2011): 587.

proven ineffective even though—and contrary to conventional federal systems—it included a provision for sanctions. Greece was bailed out in the end—in an *ad hoc* way and only to a degree—and the governments of the Eurogroup have scrambled to come up with a more systematic approach to future bailouts. The European Stability Mechanism (ESM) was set up by the finance ministers of the Euro area in 2012 as a facility that can lend up to €500 billion to individual Euro-zone members. The process, however, has been driven by summit meetings of the Eurogroup's heads of state and government. This does not bode well for those insisting that rescue can come only from turning the EU into a more fully developed federal state. Instead it points to the "presidentialization of Euro area governance."¹¹⁷ The outcome of the crisis, in other words, may be a turn toward more and not less confederalism.

Imitations and Variations

Given the enormous variation in fiscal federalism arrangements already evident from our four principal models, not much needs to be added. We briefly discuss Switzerland as an extreme case of fiscal decentralization, Australia as an opposite case of extreme fiscal centralization, and Brazil as a case in transition from decentralized fiscal irresponsibility to centralized debt control.

Fiscal Decentralization in Switzerland

Controlling two-thirds of total tax revenue, Swiss cantons and communes enjoy the most extensive degree of fiscal autonomy among federations. As a consequence of this level of subnational autonomy, fiscal federalism in Switzerland differs from that in most other federations in two significant ways: a much higher burden of fiscal responsibility and discipline falls upon cantons and communes; and strong tax competition poses a danger to economic coherence and social equitability.¹¹⁸

While Swiss cantons are individually responsible for their own fiscal discipline, nearly all of them follow rules laid down in a *Handbook of Public Budgeting* jointly edited by the cantonal finance ministers. The rules essentially amount to a balanced-budget requirement "over the business cycle," which means that deficits can occur during economic downturns but must be balanced by surpluses during upswings. Much more important for fiscal discipline, however, is the requirement of fiscal referendums laid down in most cantonal constitutions: any outlays exceeding a certain limit must be approved by the people. Some

¹¹⁷ Hodson and Puetter, "The European Union and the Economic Crisis," 372–74.

¹¹⁸ This and the following is drawn from Gebhard Kirchgässner, "Swiss Confederation," in Anwar Shah (ed.), *The Practice of Fiscal Federalism: Comparative Perspectives* (Montreal: McGill-Queen's University Press, 2007), 317–43.

cantons have adopted additional measures: automatic tax increases when temporary deficits are expected to exceed a certain threshold, and the compulsory use of surpluses for deficit and debt reduction. Similar “debt brake” measures were introduced at the federal level in 2003.

Tax autonomy invites tax competition, and in the Swiss case this results in very uneven tax burdens across cantons.¹¹⁹ Some rich cantons can spend more per capita than poorer cantons while still affording lower tax rates.¹²⁰ The degree of unevenness is mitigated, however, by the fact that Swiss tax levels are generally low in comparison with most other OECD countries, which in turn makes a reasonable scheme of fiscal equalization an attainable goal.

Fiscal equalization was first made a constitutional obligation in 1958. By the 1990s, the equalization system as established in 1959 was deemed inefficient, and a joint federal–cantonal reform process was launched. At typical Swiss glacial pace, it took 14 years before a new system was implemented, lifting the fiscal per-capita capacity of all cantons to 85 per cent of the national average, using a mixed system of vertical and horizontal fiscal-capacity equalization.

Fiscal Centralization in Australia

In Australia, the Commonwealth government controls all major tax sources, collects more than 80 per cent of all tax revenue, and funds the states for half of their revenue needs.¹²¹ Through idiosyncratic judicial interpretation, the states have been prevented from levying their own general sales taxes, and since 1942 they have been excluded from the personal and corporate income tax. This makes Australia one of the most centralized federal systems.

The Australian states receive a good part of their funding as unconditional transfers in the form of the net proceeds of the national value added tax, the GST, introduced by the Commonwealth government in 2000.¹²² However, a large amount also comes in more conditional guises. In sharp contrast to the German case, the unrestrained use of the Commonwealth government’s spending power has been given explicit constitutional expression under section 96 (“on such terms and conditions as the Parliament thinks fit”). Australia is therefore one of the most conspicuous cases of intrusive deployment of the spending power. A quarter of state revenue comes in the form of Specific Purpose Payments (SPPs) of one

119 Bernard Dafflon, “Fiscal Federalism in Switzerland: A Survey of Constitutional Issues, Budget Responsibility and Equalization,” in Amedeo Fossati and Giorgio Panella (eds.), *Fiscal Federalism in the European Union* (London: Routledge, 1999), 281.

120 Again drawing from Kirchgässner, “Swiss Confederation,” 334–35.

121 See Alan Fenna, “Commonwealth Fiscal Power and Australia Federalism,” *University of New South Wales Law Journal* 31.2 (2008): 509–29.

122 As per the *Intergovernmental Agreement on Reform of Commonwealth–State Financial Relations* (Canberra: Commonwealth of Australia and the States and Territories, 1999).

form or another, and they carry high degrees of conditionality. A major reform in 2009 rolled almost 100 of these SPPs into a handful of block grants with reduced conditionality, but did not address the ongoing ability of the Commonwealth to introduce conditional grants.¹²³ But the most extreme example of the spending power at work surely was its use by the Commonwealth government in 1942 to expel the states from the income-tax field. It simply decreed that any income-tax revenue that a state persisted in collecting would be subtracted from grants to that state.¹²⁴

Distribution of the GST revenues among the states is carried out according to recommendations of the Commonwealth Grants Commission, a statutory agency of the Commonwealth government. The complex calculations of the Grants Commission deliver a very comprehensive system of horizontal equalization, even though an obligation for such equalization is “neither enshrined in the Constitution nor set out in legislation.”¹²⁵ Instead, the Grants Commission itself developed a formula adjusting for differences between local fiscal capacities and local expenditure needs:

State governments should receive funding . . . such that, if each made the same effort to raise revenue from its own sources and operated at the same level of efficiency, each would have the capacity to provide services at the same standard.¹²⁶

Technically speaking, equalization in Australia is paid out of Commonwealth government funds since the GST is a Commonwealth tax and is thus a “vertical” transfer. However, the fact that the GST revenues are hypothecated to the states under legislation and a formal intergovernmental agreement, and equalization is carried out by adjusting each state’s share of that pool of funds according to the Grants Commission’s formula, means that in real political terms equalization in Australia is—and, most importantly, it is perceived as being—a direct “horizontal” transfer from richer to poorer jurisdictions. This means that while it is easier to implement a comprehensive degree of equalization, the winners and losers are readily identifiable. A further complication, as in Canada, is the states’ uneven

123 Department of the Treasury, *Budget Paper No. 3: Australia's Federal Relations, 2009–10* (Canberra: Commonwealth of Australia, 2009); Alan Fenna and Geoff Anderson, “The Rudd Reforms and the Future of Australian Federalism,” in Gabrielle Appleby, Nicholas Aroney, and Thomas John (eds.), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2012), 393–413.

124 Fenna, “Commonwealth Fiscal Power.”

125 Morris, “Commonwealth of Australia,” 58.

126 Commonwealth Grants Commission, *Report on General Revenue Relativities 1999* (Canberra: Commonwealth of Australia, 1999).

endowment with natural resources. By contrast with the oil-rich province of Alberta, however, which can keep a substantial part of its oil-revenue wealth under the Canadian equalization formula, equalization transfers to that province's Australian counterpart, Western Australia, are reduced in direct proportion to the amount it gains in resource rents—a source of discontent in that state.¹²⁷

Finally, not least because of the comprehensive equalization scheme, Australian states have had little need to borrow, and debt levels are therefore modest. Since a constitutional amendment in 1928, the Commonwealth has enjoyed final authority over state borrowing, which it regulated through the intergovernmental Australian Loans Council until the early 1990s. Meanwhile, this regime of “strict borrowing limits” has been replaced by one of “voluntary” compliance meant to enhance “transparency” and “financial market scrutiny.”¹²⁸

Decentralization and Debt in Brazil

Brazil shares with other more recently formed federal states in the developing world a quest for democratization associated with decentralization (see Chapter 5). In sharp contrast to those other cases, however, decentralization in Brazil under the 1988 constitution has included fiscal decentralization. While in Mexico 80 per cent of public expenditure is controlled by the central government and 70 per cent in India, for example, the number for Brazil is 56 per cent, a figure that is much more in line with mature federations.¹²⁹

In principle, the 1988 constitution established a relatively conventional mix of separate and concurrent tax assignment. In practice, the outcome shows the rather unconventional picture of a “dual fiscal regime”: states and municipalities acquired “greater power to tax and a greater share of traditional revenues”; at the same time, the federal government was assigned “a distinct set of compulsory levies” to finance social policy for all Brazilians.¹³⁰ Fiscal decentralization and the absence of a formal equalization program have resulted in the persistence of overwhelming regional fiscal inequality, which the central government also cannot address due to its pared-down revenue base.¹³¹

127 See, for example, Christian Porter, “The Grants Commission and the Future of the Federation,” *Public Policy* 6.1/2 (2011): 45–70; cf. Alan Fenna, “Fiscal Equalisation and Natural Resources in Federal Systems,” *Public Policy* 6.1/2 (2011): 71–80.

128 Morris, “Commonwealth of Australia,” 67.

129 Celina Souza, “Redemocratization and Decentralization in Brazil: The Strength of the Member States,” *Development and Change* 27.3 (1996): 541; the numbers are from the late 1980s and early 1990s.

130 Fernando Rezende, “Federal Republic of Brazil,” in Anwar Shah (ed.), *The Practice of Fiscal Federalism: Comparative Perspectives* (Montreal: McGill-Queen's University Press, 2007), 76.

131 Souza, “Redemocratization,” 542.

State debt has a long history in Brazil, as the states could essentially borrow as they wished, and the 1988 constitution did not change that. High levels of debt, in fact, go back to the 1960s when a fiscal reform by the military government meant to control state spending led instead to a federal policy of “using new loans to finance old ones in order to maintain a high rate of investment”—a practice not least owed to the clientelist ties between state governors and members of the Congress. State governors also liberally availed themselves of funds from their own State Commercial Banks (SCBs). They could do so because whenever “a governor ask[ed] his SCB for more currency than it ha[d],” the Central Bank had an obligation to “cover the deficit and to throw more currency into the market.”¹³²

The result was galloping inflation, with an annualized rate of 2,000 per cent by the mid-1990s. When currency reform, the Real Plan of 1994, rapidly brought down inflation, the state banks could no longer “pass off their huge debts on unsound loans via inflationary measures.” By 1995 virtually all of them “were facing bankruptcy.” Under newly elected President Fernando Cardoso, who as finance minister of the previous government had implemented the Real Plan, the federal government now had to resort to privatizing or liquidating the SCBs. Essentially taking over state debt to the tune of US\$50 billion, the federal government and the Central Bank in return gained at least some control over state spending and borrowing.¹³³ And long-term debt payments are still part of fiscal federalism in Brazil: financial constraints at both levels of government have resulted in a “low level of public investment,” which, in turn, has slowed down economic growth and the further reduction of social inequality. Reform efforts now aim at forging new public–private investment partnerships.¹³⁴

One one hand, the turbulent tale of fiscal federalism in Brazil only shows the difficulties of modernization typical for many federal systems in the developing world. On the other hand, it exemplifies a dilemma inherent in all federal systems confronted with substantial regional inequality: whereas too much fiscal centralization may undermine regional autonomy and initiative, too much decentralization will curtail the central government’s ability to provide a sufficient measure of equalization.

132 Souza, “Redemocratization,” 544–46.

133 Alfred Stepan, “Brazil’s Decentralized Federalism: Bringing Government Closer to the Citizens?” *Daedalus* 129.2 (2000): 161–62.

134 Rezende, “Federal Republic of Brazil,” 93.

Federalism as a System of Dual Representation

THE DIVISION OF POWERS WAS a relatively easy task for designers of the early federal systems—modernizers and traditionalists knew what they wanted, and their realms were quite distinct. However, the way in which the constituent units would be represented at the national level turned out to be a far more contentious question. What would be the basis of representation, and what powers would be granted to a second chamber? In retrospect, we are particularly interested in how the federal principle was incorporated into the design of the central government—how would it be a truly “federal” government in the sense of balancing national and regional interests in central decision-making? In order to appreciate the importance of this question, we need to take another look at the historical situation leading to federation in the first place.

In most cases, the member units had achieved the status of self-governing colonies, provinces, cantons, or states prior to federation—often as the result of hard-fought political battles. Without some form of direct representation, political leaders and elites did not want to give these achievements away to a distant central government. At the same time, however, there had been political battles for responsible government and popular representation.¹ It seemed paramount that national governments should be controlled by a general assembly of popularly elected representatives. This in turn aroused fear, especially in the smaller member units, that their particular interests would be overridden by majority decisions in such a general assembly.

This is why a bicameral compromise of **dual representation** was struck: constitute the lower house, or first chamber, on the majoritarian principle of representation by population, but add an upper house, or second chamber, constituted on the federal principle of representation by region. Legislation would have to be passed by both chambers. In this chapter, we explore the options that constitutional framers had in organizing second-chamber representation, the eventual solutions that were adopted in the major federal systems, and the degree to which second chambers have actually performed their “federal” role as safeguards of regional interests in national decision-making. In doing so, we keep in mind that while “the relationship

¹ “Responsible government” was the term in the British colonial tradition for a political executive accountable to the people’s elected representatives in parliament rather than to the Crown.

between federalism and bicameralism is a strong one,"² and bicameralism is a "natural ally of federalism,"³ it is neither peculiar nor essential to federalism. It was an existing practice that was taken up, revived, and remodelled to varying degrees and in varying ways in different federations.

Design Options

As with the division of powers, constitutional framers had to settle at least three basic design questions, which were often politically charged. First, they had to decide *in what proportion* the subnational units were to be represented. Second, they had to decide *in what way* the constituent units were to be represented. And third, they had to decide *what powers* to give to the federal chamber. The combined effect of the solutions eventually adopted has determined the status and role that second chambers play in each federation.

Accounting for Unequal Size

It is highly unlikely that a group of states contemplating federal union, or the regions in a state moving toward federal devolution, would be conveniently of similar population size. Indeed, as we noted in Chapter 3, the typical federation comprises constituent units with great differences in population. In confederal unions, this is in principle irrelevant: each member participates as a member state, not as a group of people within a state. With the transition to federalism, however, the lines are not so clearly drawn, and those involved in thrashing out the necessary compromises had a choice that ran from the confederal principle of equal representation regardless of population at one extreme, to the majoritarian principle of representation by population at the other.

Both of these solutions violate important principles of fairness. Equal representation regardless of size makes no concession to the democratic principle of representation by population. And, given the propensity for federations to comprise units of greatly differing population, equal representation will produce pronounced malapportionment. At the opposite extreme, straightforward majoritarianism only duplicates the allocation of seats and votes in the first chamber and makes no concession to the federal principle of regional representation. This deprives smaller units of protection from majority interests and violates the very foundations of federalism as a system of guaranteed group protection.

2 Wilfried Swenden, "Subnational Participation in National Decisions: The Role of Second Chambers," in Henrik Enderlein, Sonja Wälti, and Michael Zürn (eds.), *Handbook on Multi-Level Governance* (Cheltenham, UK: Edward Elgar, 2010), 103.

3 Campbell Sharman, "Second Chambers," in Herman Bakvis and William M. Chandler (eds.), *Federalism and the Role of the State* (Toronto: University of Toronto Press, 1987), 96.

The path of equal representation was taken by the Americans, conforming naturally to their original confederal approach under the *Articles of Confederation*. This results in “massive overrepresentation” of the small states; modern-day California is awarded the same number of Senate seats as Wyoming, despite having 66-times the population.⁴ Among the classical federations, only Australia and, with a minor variation, Switzerland have followed this example—and in Australia malapportionment at its most extreme is only 14:1 (New South Wales vs. Tasmania).

With one peculiar exception, Belgium (see Chapter 9), no cases of a strictly majoritarian second chamber exist. Instead, most other federal systems have adopted a weighted system of representation. Small member units are given more weight than they would command on the basis of their populations. Larger units still receive more seats and votes than smaller ones, but they cannot automatically dominate the decision-making process. Typically, seats and votes are adjusted on a narrow scale. In the German system, for instance, each *Land* is accorded between three and six votes according to population. In the Indian upper house, the *Rajya Sabha*, however, state representation varies in a range between 1 and 31 seats.

In either case—equal or weighted representation—the intended effect of providing a second-chamber buffer of regional group protection against the will of the popular majority very much depends on numbers and on socioeconomic symmetry or asymmetry. If, for instance, a federation comprises several English-speaking provinces and only one French-speaking province, as is the case in Canada, neither form of minority protection will be sufficient. If, on the other hand, economic and popular strength is concentrated in a minority of large units, as has been the case in Germany after reunification, any form of equal or weighted representation that allows a majority of smaller and weaker units to gang up against the larger ones will be found problematic. However, it may be possible to find a balanced formula of weighted representation that allows neither side to dominate the other entirely. As we will see in the next chapter, in matters of fundamental importance—such as constitutional changes affecting the distribution of powers—a super majority of more than 50 per cent is usually required, in addition to such measures as ratification by a significant number of member units, to compensate for this problem.

4 Alfred Stepan, “Toward a New Comparative Politics of Federalism, (Multi)Nationalism, and Democracy: Beyond Rikerian Federalism,” in *Arguing Comparative Politics* (New York: Oxford University Press, 2001), 341.

5 Rajeev Dhavan and Rekha Saxena, “Republic of India,” in Katy Le Roy and Cheryl Saunders (eds.), *Legislative, Executive, and Judicial Governance in Federal Countries* (Montreal: McGill-Queen’s University Press, 2006), 173.

Representation of People or Governments?

The second question about federal bicameralism is who or what should be represented in the first place. Even from a democratic perspective, it is by no means an easy question to answer.

As we have noted in earlier chapters, there are two possible options or models for second chamber representation. In one, the senate model, the regional *populations* are represented. In the other, the council model, regional *governments* are represented. Senators generally do not act as delegates—as instructed agents of their regions; rather they act as trustees—as individuals or party members. Council members, on the other hand, vote as instructed delegates of their governments and deliver their votes *en bloc*. The council approach is more consistent with the federal principle; however, it may be seen as less consistent with the democratic one.

According to a somewhat hybrid third option, the representatives of second chambers can also be chosen by regional legislatures rather than by regional populations or governments. In this case, representatives may be free to vote as they choose, but how they vote may depend on the power configurations in the regional assemblies that elected them. As we will see below, the American framers chose this third option for the US Senate, and popular election was adopted only when the Seventeenth Amendment was ratified in 1913. While this approach of indirect election was phased out in the United States, it remains in use elsewhere, notably in Austria and India.

The members of second chambers in most federations are either directly elected, indirectly chosen by regional legislatures, or some combination of the two. Among the classical federal states, only Germany adopted the council model. For a number of reasons, though, it is an important model beyond its significance for German federalism: first, because council governance in the EU has followed a similar pattern; second, because it has been chosen for the new federation of South Africa; and third, because in practice it is the one model that functions in a truly federal fashion. The South African case is particularly interesting in this regard, because having initially opted for a senate-style upper house, the Constituent Assembly made the very deliberate decision to reject that approach in favour of a National Council of Provinces in the mould of more German-style administrative federalism instead.⁶

Second-Chamber Powers

Neither the type nor the balance of representation matters much if the federal chamber does not have a significant role to play. The third and final question,

6 Nicholas Haysom, "Federal Features of the Final Constitution," in Penelope Andrews and Stephen Ellman (eds.), *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (Johannesburg: Witwatersrand University Press 2001), 513.

then, is what powers that second chamber should be given. The upper house could be made equal in power to the lower house; it could be made weaker; it could be made stronger; or it could be made stronger in some respects and weaker in others. But since there is good political reason for any one of these options, constitutional designers have had to make difficult choices in practice. In making those decisions, they had to confront issues of democratic control and, in parliamentary systems, of responsible government.

The argument for *equal* powers is this: the very essence of federal bicameralism centres upon the idea that the popular or majority will needs to be balanced by the compounded will of self-governing regional populations or their governments. If this idea is to be taken seriously, it seems out of the question that second chambers could be overruled by parliamentary majorities in the first chamber.

However, there are some serious arguments in favour of a *weaker* second chamber, particularly in parliamentary systems. One of these has to do with the traditional understanding of representative democracy: the chamber that speaks and acts as a directly elected assembly for the population as a whole should have the last word on at least the touchstone matters of national governance. Another has to do with the parliamentary principle of responsible government according to which the executive is accountable to the people via the people's elected representatives. Since the executive government—prime ministers and cabinets—cannot be accountable to two legislative chambers, which might vote differently on a particular issue, second chambers cannot have equal powers. A stand-off between the two houses creates a considerably more awkward situation in parliamentary systems than it does in presidential ones, where the separation of powers means that the executive is accountable to the people directly, rather than via the legislative branch.

In practice, the relative powers of federal upper houses have been curbed in one of three ways. One is to give second chambers only a suspensive veto, by which legislation can be delayed for a constitutionally determined period of time but not vetoed altogether. Another is to provide a last-resort mechanism for resolving disagreements. And the last is to limit the policy fields in which second chambers have equal powers.

The case for a *stronger* second chamber is more difficult to make, and particularly so because it is reminiscent of an era when upper houses were based on a limited suffrage franchise or hereditary entitlement. However, from a federalist point of view, there is a case to be made for a second chamber having special powers, giving it a superior role in matters of an inherently federal nature. The US Senate was given special powers in regard to the ratification of treaties and executive appointments, notably appointment to the Supreme Court. The EU in turn constitutes a novel case of second-chamber governance, which underscores the fact that its members are not entirely prepared to let go of its confederal origins.

Second-Chamber Performance

Because of its historical association with the great innovative compromise between large and small states in the formation of the first modern federal system, the United States of America (see below), bicameralism is often seen as the quintessential institutional device for upholding the federal bargain.⁷ And indeed, among the 25 or 26 federal systems in the world, depending on how one counts them, only four are unicameral: two of these are tiny island federations—the Federated States of Micronesia in the Pacific Ocean, and St. Kitts and Nevis in the Caribbean. The other two are the United Arab Emirates, effectively a federation among hereditary emirs, and Venezuela, which abolished its senate in 1999 in order to give way to the populist governance style of then-president Hugo Chavez.

Yet it is possible to see second chambers as the most overrated device in the institutional arsenal of federalism. Especially in directly elected senates, partisanship and the desire to get re-elected much more profoundly determine individual senators' voting behaviour than collective concerns for federal balance and subnational autonomy. The situation is different in council-type second chambers where government-instructed delegates represent collective subnational interests much more directly. But even there, party competition may overshadow the "federal" role that second chambers are supposed to play. As we will see in the German case, the fact that the party composition of the *Bundesrat* strongly determines what legislation it approves even backfires onto *Länder* elections, which are fought over national rather than regional issues more often than not.

The American Senate Model

For the Americans, the decision of who should be represented, and how, proved a challenging one that emerged from a tangled debate that pitted different interests and different visions against one another. The eventual outcome had great influence on federations that were to follow. There had been second chambers before—the ancient Roman Senate, the British House of Lords, and other European upper-class chambers—but these represented class interests and not territorial ones. Thus, even if the original design of the American Senate shared with these older bicameral systems an effort at constructing a "conservative brake" on the popular will,⁸ as Madison argued in *Federalist* 62 that it should, the American Senate differed dramatically from them in its recognition of two different geographical conceptions of citizenship. Rather than representing different people, as those traditional upper houses did, the American Senate was

7 See Ralph A. Rossum, *Federalism, the Supreme Court, and the Seventeenth Amendment: The Irony of Constitutional Democracy* (Lanham, MD: Lexington Books, 2001), 104.

8 Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, 2nd ed. (New Haven, CT: Yale University Press, 2012), 190.

designed to represent people differently: as members of regional communities. There is no doubt, though, that the emergence of bicameralism as a key element of the federal compromise was greatly facilitated in the United States by a resurgent interest in bicameralism on traditional conservative grounds. The experience of unicameral popular rule in the various states after 1776 generated a strong desire to have an upper house, on whatever design, that would curb the democratic excesses of the people's representatives.⁹ Out of this emerged the original American Senate, a chamber that was envisaged by its creators as a counterpart to the British House of Lords.¹⁰ In the highly influential words of John Adams at the time, "a people cannot be long free, nor ever happy, whose government is in one assembly."¹¹ In the United States, constitutionalism and federalism converged to provide a powerful impetus for bicameralism.

Big States vs. Small States

Most delegates came to Philadelphia in 1787 with the general intention of making the Confederation more effective without, however, seriously eroding the sovereignty of the states. A central issue, therefore, was what weight states of greatly varying size would have in the new Congress. There were two precedents for consideration. One was the single-chambered Congress under the *Articles of Confederation* in which each state had one vote. The other was the older Albany Plan of 1754, which had aimed at a union among American colonies. As suggested by Benjamin Franklin, its mode of legislative governance would have been a "Grand Council" with weighted representation ranging from seven seats for the largest colony (Virginia) to two for the smallest (New Hampshire). Although supported by the British, the Plan was rejected by the colonial legislatures.¹²

The first comprehensive plan taking on the issue of representation at the Convention, however, proposed a radically new form of union government. Madison's Virginia Plan put forward a bicameral solution with an elected lower house and an appointed upper house representing the states. However, this was unacceptable to the smaller states, since population would be the principle of representation in both houses. They, therefore, countered with the New Jersey Plan, which retained the unicameral Congress of the Confederation with its equal state representation. The smaller states were in the majority, and the demographic differences were significant. With about 450,000 white inhabitants, Virginia

9 Under the 1776 Pennsylvania constitution, for instance, almost all powers were given to a unicameral assembly that governed without a governor or president.

10 Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: University Press of Kansas, 1985), 215.

11 Gordon S. Wood, *The Creation of the American Republic 1776–1787* (Chapel Hill: University of North Carolina Press, 1969), 208–9.

12 Wood, *The Creation of the American Republic*, 135–37.

was about ten times more populous than Delaware.¹³ But this represented little advance over the status quo and was clearly not going to win over the larger states. Eventually, when deadlock threatened to shut down the Convention, a new committee finally delivered the so-called Connecticut Compromise. It gave to each side an essential part of what they wanted: a directly elected House of Representatives representing the people by population, as the large states wanted; and a Senate with two senators each representing the states *qua* states, to mollify the small states.

Federal bicameralism was born out of the need to resolve this conflict between two opposing considerations. And resolve the conflict it did—at least in the minds of the framers: bicameralism would allow the two forms of representation to balance each other out. But did all of this matter anyway? As Madison argued at the time—and as was quite obvious—the regional divide in American politics was not between big states and small states; the divide was between slave states and free states, and there were large and small ones on each side. And, indeed, the numbers game about large and small that so dominated the proceedings would not become the defining issue in the new Congress. Almost by default, it seems, equal state representation became the undisputed hallmark of American federalism—without serving any clear purpose, and indeed with distortionary consequences.¹⁴ It nevertheless became the template for other federations.

A States' House?

There was never much doubt that the framers would settle on indirect election for the Senate. On the one hand, direct election was inconsistent with both the restraining role envisaged for the upper house and the federal role familiar from existing practice. The Virginia Plan had already proposed a senate elected by the lower house—a system of indirect election regarded at the time as an effective way of refining the popular will and cleansing it of some of its baser elements. The existing Congress and the Convention were also constituted in this fashion. On the other hand, the creation of a council-style upper house in the German pattern was out of the question because the post-revolutionary state constitutions had all but abolished their executive governments altogether and centred government power on their legislatures.¹⁵

Even though they were elected representatives of their legislatures rather than delegates of their executive governments, senators were originally expected to act in a delegate fashion. It was assumed that legislatures would instruct their representatives

13 Frederick K. Lister, *The Later Security Confederations: The American, "New" Swiss, and German Unions* (Westport, CT: Greenwood, 2001), 25.

14 See Frances E. Lee and Bruce I. Oppenheimer, *Sizing Up the Senate: The Unequal Consequences of Equal Representation* (Chicago: University of Chicago Press, 1999), 2 and *passim*. ♦

15 Wood, *The Creation of the American Republic*, 135–37.

to the US Senate, and they attempted to do so.¹⁶ However, the nature of the Senate was inherently ambiguous in this respect. State legislatures had in practice very little leverage over the senators once chosen. The constitution included no provision for recall, and the six-year terms placed members of the Senate in a much more permanent position than the typical member of a state legislature. It was not an arrangement that would make the Senate a thoroughgoing states' house.¹⁷

Equal Powers

In order to appreciate the relative ease, by comparison, with which the Americans established two legislative chambers with equal powers, we need to remember that they were transforming a confederation of republican governments. Their major concern in terms of establishing an effective union government was not how the popular will should be represented in that government. Because that popular will *would* be represented, their primary preoccupation was with the representation of state interests. And if state representation in the Senate was to provide an effective check upon the majority powers in the House of Representatives, anything less than equality with the legislative powers of the House was simply out of the question.

The idea of equal powers between the two chambers was never challenged. In fact, as Hamilton, Jay, and Madison presented it in a number of essays (*Federalist* 62–66), strong bicameralism constituted the core of an emerging doctrine of checks and balances in which the Senate was seen as the most important player. Its concurrence in legislation would allow it to serve as a “check” on the uncontrolled passions—and “factions”—of the popular assembly. Meanwhile, its smaller number of members would ensure cohesion and authority, while the extended duration of senatorial mandates—six years as compared to two years for the House—and the staggered mode of election—renewing the mandate of one-third of senators every two years—would provide both continuity and a crucial “balance wheel” effect, ensuring that the legislature was made up of groups that were “out of sync” with each other and with public passions.¹⁸ In this sense, the American Senate was conceived much more as an instrument of republicanism, or limited government, than of federalism.

According to this doctrine of checks and balances, the two congressional chambers would restrain one another by a mutual veto. More importantly still, such a mutual veto would also determine the relationship between the Congress and the executive. The president would have to govern on the basis of

16 Rossum, *Federalism, the Supreme Court, and the Seventeenth Amendment*, 96–98.

17 William H. Riker, “The Senate and American Federalism,” *American Political Science Review* 49.2 (1955): 452–69.

18 Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), 162–63.

congressional legislation, but would also have the right to veto such legislation. Two additional measures of control were given exclusively to the Senate, however. It would have the power of ratifying key appointments and international treaties. It has been these powers of ratification that have established the Senate as the weightier of the two congressional chambers, particularly so in public perception.

A final issue was impeachment—the forced removal of the president, or other “civil officers” such as federal judges, from office. Here the House would lay the charges, while the Senate would conduct the trial and convict by a two-thirds majority.

Completing the Senate Model

In 1913, the Seventeenth Amendment replaced indirect with popular election of senators. In several ways nothing much changed with the introduction of direct senatorial elections, and for the time being, the Senate remained a “Millionaires’ Club.”¹⁹ However, it has been argued that this downgrading of the Senate from an albeit imperfect house of the states to a popularly elected chamber removed the keystone from the arch of the American federal system, and without that keystone the arch soon collapsed: “the main peripheralizing feature of American federalism was excised from the Constitution.”²⁰ The Senate, not the Supreme Court, was the institution the founders expected to be the guarantor of the federal balance. “Following ratification of the Seventeenth Amendment, there was a rapid growth of the power of the national government, with the Congress enacting measures that adversely affected the states as states—measures that, quite simply, the Senate previously would never have approved.”²¹

Canada: A Case of Pseudo-Bicameralism

While the Americans negotiated their way to a novel form of representative government, the Canadians generally aimed at changing as little as possible. With responsible government having recently been achieved, neither the primacy of parliamentarianism nor the appropriateness of popular democratic rule through the lower house was much disputed. In tandem with the fact that the two main provinces, Ontario and Québec, were created by devolution from an existing legislative union, it is hardly surprising that Canada did not end up with the powerful and confederal-style upper house that the Americans had given themselves. In Canada there was neither the conservative thrust for a restraint on democracy nor the confederal thrust for a restraint on majoritarianism. The

19 See James Q. Wilson and John J. Dilulio, *American Government: The Essentials*, 7th ed. (Boston: Houghton Mifflin, 1998), 306–7.

20 Riker, “The Senate and American Federalism,” 469.

21 Rossum, *Federalism, the Supreme Court, and the Seventeenth Amendment*, 2.

consequence was the creation of the only federal government among the true federations that while bicameral in form, is unicameral in effect.

By Appointment Only

The idea of a second and regional chamber of representation no longer had to be invented and also was not disputed in principle. But the members of the new Canadian Senate were to be neither elected directly by regional populations nor chosen indirectly by regional governments. These options were discussed, but in the end it was agreed that senators would be appointed by the governor-general (and hence in reality by the prime minister).

The basic reason for this odd choice was that the Canadians did not want an upper house that would challenge the lower house. As the designers of the first conventional parliamentary system to adopt a federal structure, the Canadians were acutely aware of the problems that strong bicameralism posed for the basic functioning of the system. How can an executive government be "responsible" to two different masters? By contrast with the presidential system, a difference or deadlock between the two houses would threaten the executive government itself. Thus, even the leading Conservative, John A. Macdonald, extolled the virtues of a weak upper house: "There is an infinitely greater chance of a deadlock between the two branches of the legislature, should the elective principle be adopted, than with a nominated chamber."²²

To create a powerful upper house in the name of federalism also would have meant adopting the anti-democratic principle of checks and balances that so inspired the Americans. Canadians showed little interest in compromising on the newly won right to responsible government by creating a second chamber that would potentially contradict the first. This was a particularly forceful consideration for the strongly democratic "Reformers" who were prominent in the negotiations. Reform leader George Brown spoke for many of them when he declared: "I have always been opposed to a second elective chamber, and I am so still, from the conviction that the two elective houses are inconsistent with the right working of the British parliamentary system."²³

Other Reform participants were even more explicit about the attractiveness of the appointment basis: a "stubborn" upper house could be brought back into line "quickly and sharply."²⁴ Canadians had neither the conservative drive to protect the rights of property holders nor the confederalist drive to protect the rights of the provinces that had led to the creation of the US Senate. Instead, the discussions of second-chamber representation were driven by majoritarian

²² Janet Ajzenstat, Paul Romney, Ian Gentles, and William D. Gairdner (eds.), *Canada's Founding Debates* (Toronto: Stoddart, 1999), 82.

²³ Ajzenstat, et al., *Canada's Founding Debates*, 83.

²⁴ Walter McCrae in Ajzenstat, et al., *Canada's Founding Debates*, 90.

instincts. The appointed Canadian Senate represented the use of undemocratic means to achieve democratic ends. The founders thought that the members of a government-appointed Senate with formally equal powers (see below) would do what they wanted it to do: provide the people's representatives in the lower house with "sober second thought" yet "have the prudence to defer to the Commons when deference is appropriate."²⁵ Perhaps surprisingly, the founders for the most part got what they wanted.

Regional Weighting

Given that the founders did not want to create a strong upper house to begin with, it is even more surprising that the question of just how regional representation ought to be apportioned in that upper house became one of the most protracted disputes in the entire process leading up to Confederation. A regional rather than provincial formula was chosen because the union was generally considered to comprise three regions: Ontario, Québec, and the Maritimes. While the small Maritimes obviously saw disproportionate representation in the upper chamber as the one safeguard of their interests that a federal union with the two large central provinces would provide them with, Québec insisted on equal representation for all three regions as a minimum safeguard of French interests especially against Ontario, which would dominate the union with its larger and rapidly growing population.

In the end, the three regions were assigned 24 senators each. The regional equality formula became problematic only after it was extended to the four western provinces in 1915 with an allotment of six senators each. Given the economic weight and population size of western Canada, this allotment came to be seen as patently unfair and, together with the appointment procedure, fuelled never-ending western calls for Senate reform or even abolition (see below).

Far from Equal

Formally, the Senate was given equal powers. In reality, its unelected status has reduced its role to that of a provider of "sober second thought." Rarely have senators used their powers to defeat a bill that had found approval by the elected majority in the House of Commons.²⁶ Although its professionalism has increased over the years, the overall image of the Senate has not. Senatorial

25 Janet Ajzenstat, "Bicameralism and Canada's Founders: The Origins of the Canadian Senate," in Serge Joyal (ed.), *Protecting Canadian Democracy: The Senate You Never Knew* (Montreal: McGill-Queen's University Press, 2003), 13.

26 This happened on occasion with regard to particularly controversial bills, such as the 1991 abortion bill; see C.E.S. Franks, "The Canadian Senate in Modern Times," in Serge Joyal (ed.), *Protecting Canadian Democracy: The Senate You Never Knew* (Montreal: McGill-Queen's University Press, 2003), 152-88.

appointments are widely and not incorrectly seen as plum job rewards for party faithful heading for semi-retirement.

Senators are caught between a rock and a hard place. To borrow the words of leading French Revoution constitutionalist the Abbé Sieyès, if they routinely and unquestioningly approve lower-house legislation, senators show themselves to be superfluous; if they beg to differ they are seen to be mischievous—an obstacle to democracy and responsible government. Senators do provide useful legislative services in their deliberations and fine-tuning of parliamentary bills, spending most of their time in parliamentary committees discussing key issues and making recommendations for policy initiatives. But ultimately they have little choice but to exercise self-restraint in opposing a government whose legitimacy is firmly grounded in parliamentary majority rule.

Senate Reform Forever

The Canadian Senate has remained an oddity, and not only within the family of federations. Its members are all appointed yet technically it has equal powers, and the historically based formula of regional representation is patently unbalanced. Calls for Senate reform in Canada have come from several quarters—from prime ministers faced with rare bouts of Senate opposition; from concerned democrats; and from western regions resenting their underrepresentation and their powerlessness in the face of central Canada's demographic dominance in the lower house.²⁷ However, nothing has ever come of such calls. Over the past 30 years alone, "no less than twenty-eight government and political party proposals on Senate reform have failed."²⁸

In particular, Senate reform became a western bargaining chip in exchange for recognition of Québec's distinct-society status during various failed rounds of attempted constitutional reconciliation. These grievances were formalized by the province of Alberta as demands for an American-style "triple-E Senate"—a Senate that is "elected, effective and equal."²⁹ The decision of a strongly confederalist province to advance the senate rather than the council model is in some ways surprising.³⁰ General experience with

27 The four western provinces of Manitoba, Saskatchewan, Alberta, and British Columbia have together just under 30 per cent of Canada's population. Ontario has over 37 per cent alone.

28 See Jack Stilborn, "Forty Years of Not Reforming the Senate," in Serge Joyal (ed.), *Protecting Canadian Democracy: The Senate You Never Knew* (Montreal: McGill-Queen's University Press, 2003), 31–66.

29 Legislature of Alberta, *Strengthening Canada: Reform of Canada's Senate* (Edmonton: Plains Publishing, 1985).

30 Michael Lusztag, "Federalism and Institutional Design: The Perils and Politics of a Triple-E Senate in Canada," *Publius* 25.1 (1995): 35–50. The government of Alberta had in fact made a "house of provinces" proposal analogous to the *Bundesrat* earlier, in 1982. But the triple-E slogan proved to be more attractive.

elected federal upper houses has thoroughly demonstrated that modern party discipline negates any role they might play as a states' house. In a strongly populist context, though, the senate model of direct elections is a predictable choice. Outside of Alberta, the proposal has received understandably limited support. The dominant provinces of Ontario and Québec do not feel the same regionalist grievance, and the generally poorer provinces in the east do not feel the same desire as the rich province of Alberta for an upper house that would constrain nation-building policies. An agreement for Senate reform approximating triple-E characteristics nevertheless was finally reached with the Charlottetown Accord of 1992, but it died when voters rejected the Accord in a national referendum.

Ordinary Canadians, it seems, did not care enough, and the reform proposal was embedded in a package deal too complex for substantive political agreement. Charlottetown was generally thought to be the end of the Senate reform saga, yet it resurfaced again in 2006 after Conservative leader (and now prime minister) Stephen Harper, also from Alberta, had made it a central part of his electoral platform. However, after seven years in office and Senate business as usual, the reform debate only heated up when a Senate expenses scandal brought public attention to the issue. Harper seized the opportunity by asking the Supreme Court of Canada for a reference on reform or outright abolition of the Senate. The Court's answer was that reform required a constitutional amendment under the 7/50 formula, and abolition required unanimity (see Chapter 10). As sufficient agreement for an amendment under either formula seemed unlikely, Harper dropped the issue altogether. The Canadian Senate will continue to exist in its current form, at least for the time being.

In all its futility, the pursuit of Senate reform in Canada is nonetheless instructive. The Canadian Senate may be an oddity in its lack of democratic legitimacy, but in its lack of "federal" performance it is not much different from directly elected senates elsewhere. The simple idea of dual representation so ingeniously engineered by the American framers gives quintessential institutional expression to the core of the federalist bargain, yet it routinely fails to deliver on its promise of regional participation in national law-making. However, our next model case, the German *Bundesrat*, may be the exception to the rule.

Germany: The Federal Solution

The German road to democratic federalism has been distinctive in many ways, and so have been some of its solutions. Among these has been the construction of an upper or second chamber of regional representation that is "extra-ordinary" by comparison with that in other federations.³¹ By some estimates it is a uniquely

31 Swenden, "Subnational Participation in National Decisions," 16.

"federal upper house."³² Bismarck's 1866 chamber of regional representation was a council of ruling kings and princes that also found its way into the imperial constitution of 1871. The Weimar Constitution replaced princes and kings with representatives of the *Länder* governments but left the chamber with only limited powers and influence. The third version, reconstructed democratically at the end of the Second World War, followed the same pattern, regained a more powerful role, and set a precedent for council governance in the EU. Like the United States, Germany has had a tradition of strong federal upper houses as a result of the convergence of two complementary forces: anti-democratic conservatism and confederalism. The form that those upper houses have taken, though, is significantly different.

Evolution of the Council Model

Germany's council model of a federal upper house has roots that can be traced back to the seventeenth and eighteenth centuries,³³ and today's *Bundesrat* has been described as "the successor" to the Perpetual Imperial Assembly (*Immerwährender Reichstag*) of 1663.³⁴ The modern version arose more directly out of the nineteenth-century process of unification under Prussian hegemony. As a first step, the German Confederation (1815–66) was quite similar to the American one in that its only governing organ, the *Bundestag* (Federal Assembly), was an assembly of instructed low-level delegates. It had complex voting procedures, which were entirely unrealistic because the two dominant powers, Austria and Prussia, would not tolerate being outvoted.

After the Austro-Prussian war of 1866 and the exclusion of Austria from German politics, Bismarck forged ahead with a North German Confederation (1867–71) for which he developed a constitution that for the first time included a directly elected assembly. But he also retained the *Bundestag*, now renamed *Bundesrat* (Federal Council), as a chamber of continued governmental representation. This established the nucleus of the *Reichsverfassung*, or imperial constitution, of 1871, when the states of southern Germany were persuaded to join the Confederation at the end of the Franco-Prussian war.

The lower house was the *Reichstag*, directly elected but endowed with only limited powers, and the upper house was the *Bundesrat*, effectively the empire's

32 Werner J. Patzelt, "The Very Federal House: The German *Bundesrat*," in Samuel C. Patterson and Anthony Mughan (eds.), *Senates: Bicameralism in the Contemporary World* (Columbus: Ohio State University Press, 1999), 59–92.

33 Patzelt, "The Very Federal House"; in fact, it can be traced back even further, all the way to the imperial assemblies of the Middle Ages, even though these were convoked only periodically and therefore were not *immerwährend*.

34 Uwe Leonardy, "The Institutional Structures of German Federalism," in Charlie Jeffery (ed.), *Recasting German Federalism: The Legacies of Unification* (London: Pinter, 1999), 4.

supreme legislative and executive organ. Prussia held only 17 of the 58 *Bundesrat* seats, but in cases of conflict with the so-called medium states (such as Bavaria, which also held 17 seats), Prussia could easily pressure the smaller states and cities into majority support. The delegates did not have a free mandate but had to deliver bloc votes as instructed by their governments. Thus, the impression of Prussian hegemony was avoided yet *de facto* secured at the same time. This was smoothed over by Bismarck's skillful leadership, which avoided coercive techniques. Instead, negotiations in this "princely insurance company against democracy"³⁵ typically went on until consensual agreement was reached.

A Länder Council

When West Germany was reconstructed as a democratic federal republic after the Second World War, recourse to these institutional traditions and historical practices was by no means automatic. Social democrats initially favoured a senate-type second chamber, which they thought would secure democracy as an independent counterweight to political parties and bureaucracies at both levels of government. Conservatives in turn emphasized the historical role of the *Länder* as counterweights to the vicissitudes of party politics—especially during the turbulent Weimar years—and insisted that only a *Länder* council would bring about democratic stability through the traditional means of intergovernmental (executive) cooperation and negotiation.³⁶ The conservative recourse to tradition prevailed in the end, and the second chamber, again called the *Bundesrat*, was created to represent democratically elected *Länder* governments, not only as a counterweight against creeping centralization but also as an "executive insurance company" against the baser instincts of party competition. Arguably, it disappointed in both these respects.

Like its forerunners, the new *Bundesrat* was designed to give the *Länder* direct representation in the national parliament as constituent units rather than as populations. The *Länder* governments can send as many delegates to the *Bundesrat* as they have votes, but their votes have to be delivered as a uniform bloc vote, and by a vote leader designated before each session. Because there are no elections, the *Bundesrat* is a permanent chamber that is called into session whenever it is required to vote on pending legislation. Its composition changes only as *Länder* governments change.

Weighted Representation

The federative territorial order in West Germany after 1945 was largely an imposed creation by the Allied occupational forces. Eleven new *Länder* were

35 The German social democrat Wilhelm Liebknecht, as quoted in Ernst Engelberg, *Bismarck: Das Reich in der Mitte Europas* (Berlin: Siedler, 1990), 51.

36 See Gerhard Lehmbruch, *Parteienwettbewerb im Bundesstaat: Regelsysteme und Spannungslagen im Politischen system der Bundesrepublik Deutschland* (1976; Wiesbaden: Westdeutscher Verlag, 2000), 77–82.

forged out of the old territories. With a few exceptions, boundaries were drawn rather arbitrarily. *Länder* governments were initially appointed by the Allied powers, but elections were held as early as 1946. In 1952, three of the southwestern *Länder* merged into one (Baden-Württemberg), and in 1957 the Saarland rejoined West Germany,³⁷ eventually making for a total of ten West German *Länder* plus West Berlin.

With the creation of *Länder* governments and elections also came the reconfiguration of political parties. And as in the case of the senate-versus-council issue, social democrats and conservatives differed on the question of how *Länder* representation in the *Bundesrat* should be apportioned. While the social democrats wanted equal representation, the conservatives preferred representation on the basis of population. A compromise was reached with a formula of representation recognizing population size yet giving the smaller units additional weight.³⁸

Under the original formula laid down in Article 51(2) of the Basic Law, the formula of staggered votes applied to the ten *Länder* as follows: a minimum of three votes to those with fewer than two million inhabitants (Hamburg, Bremen, and Saarland); four votes to those with more than two million (Hesse, Rhineland-Pfalz, and Schleswig-Holstein); and five votes to those with more than six million people (North Rhine-Westphalia, Bavaria, Baden-Württemberg, and Lower Saxony). West Berlin had four additional non-voting seats due to its status as a city under Allied command.

With reunification in 1990, 5 additional *Länder* were added, and Berlin became a 16th *Land* with full voting rights. The formula of weighted governmental representation was adjusted because most of the new *Länder* in the east were smaller and poorer, and the four largest *Länder* in the west (with a population exceeding seven million) feared they would end up in a permanent minority situation. Hence Article 52(2) was amended to include the additional provision that *Länder* with more than seven million inhabitants would have six votes. Seats and votes add up to 69 in the current *Bundesrat*.

As Good as Equal

Agreement to a council-type second chamber was the result of compromise: if the social democrats accepted the *Bundesrat* option, the conservatives would retreat from their insistence on equal powers.³⁹ Yet while the *Bundesrat* thus was not given formally equal powers, it is in reality one of the most powerful second chambers to be found in any federal system.

37 In both instances as the result of a referendum.

38 Heinz Laufer and Ursula Münch, *Das föderative System der Bundesrepublik Deutschland* (Opladen: Leske + Budrich, 1998), 86-87.

39 Lehmbruch, *Parteienwettbewerb im Bundesstaat*, 79.

The Basic Law determines that all legislation has to pass through the *Bundesrat* (Article 77[1]). However, it distinguishes two types of legislation. The first requires approval in both chambers. With regard to the second, the *Bundesrat* can only object (by absolute or two-thirds majority), but its objection can be overridden (by a likewise absolute or two-thirds majority, respectively) in the lower house, the *Bundestag*. The intention was to make the second option, legislation without required *Bundesrat* approval, the default procedure. Therefore, areas of legislation requiring such approval were specifically identified as such throughout the Basic Law. Apart from constitutional amendment (see Chapter 10), the main areas among these are:

- federal laws in the concurrency field to be administered by the *Länder*—since 2006 only when the possibility of deviating *Länder* legislation is denied (Article 84(1)—see Chapter 6);
- federal laws obligating the *Länder* to provide services at their own cost (Article 104[4]);
- federal laws concerning taxation shared with the *Länder* and municipalities—Article 105(3).

One can easily see that almost all the important acts of federal legislation would eventually fall under this type of “approval legislation.” Even after the 2006 reforms, which aimed at legislative disentanglement, some 40 per cent of all federal legislation still does. The constitutional designers did not expect or anticipate the heavy and near-equal weight that the *Bundesrat* acquired over time. The outcome had more to do with the administrative division of powers than with the stipulations about bicameralism in the Basic Law. Since the *Länder* have the constitutionally assigned task of implementing and administering most national legislation, their powers and duties are routinely and automatically affected, and judicial consensus developed that the *Bundesrat* would therefore have to approve such legislation.

This makes the *Bundesrat* such a powerful second chamber for a combination of reasons. Its members are prominent regional politicians who typically also play important roles in the national party system. In most important decisions, the *Bundesrat* votes are delivered by the *Ministerpräsidenten* (premiers) of the *Länder*. Via the *Bundesrat*, the *Länder* governments have the right to initiate legislation, they play a crucial role in policy formulation, and they bear exclusive responsibility for implementation and administration. While accountable only to the *Bundestag*, the German chancellor and cabinet can do little without giving serious consideration to the interests of the *Länder* governments. On the occasion of the Maastricht Treaty, the *Bundesrat* even managed to bring about a constitutional change that secured a participatory role in European affairs for the *Länder*—until then seen as the central government’s exclusive power²

in the foreign policy domain (Articles 23 and 50 of the constitution as revised in 1992).

The Mediation Committee as the Linchpin of German Federalism

As we saw in the Canadian case, constitution makers were acutely aware that the combination of strong bicameralism with parliamentarianism creates the potential for destabilizing the entire system. The Canadian solution was to avoid the risk; the German solution was to anticipate it, by establishing, under Article 77 of the Basic Law, a Mediation Committee designed to avoid legislative deadlock and bring about compromise. Significantly, the *Bundesrat* members on the committee are not bound by government instructions.⁴⁰ The organizational details were left to procedural rules to be established by mutual agreement between both chambers. According to these rules, the Mediation Committee is currently (after reunification) composed of 16 members from each chamber.

The Mediation Committee was closely modelled after the American "conference committees," which are called into action on an ad hoc basis in the case of differing bills on a particular matter in the House and Senate. By contrast with these Congressional conference committees, however, the Mediation Committee was established as a permanent body for each legislative period. Its members therefore are generalists rather than specialists.⁴¹ This has implications for the dynamic of proceedings, which may be guided more by political than functional considerations, and especially so when the opposition commands a majority in the *Bundesrat* and in the Mediation Committee.

The *Bundesrat* has a right to bring any bill before the Mediation Committee, regardless of whether its approval is required. The *Bundestag* and the federal government, on the other hand, can do so only in the case of approval legislation. If a compromise is found, both chambers have to deliberate and vote on the bill anew. Given its firmly institutionalized role, the Mediation Committee can be seen as the linchpin of the German federal system, and by and large it has performed its function of avoiding deadlock between the two chambers very successfully.

Federalism and Party Competition

As well as abolishing federalism, the totalitarian Nazi dictatorship in 1933 also did away with party competition. Consequently, in their effort at making German democracy unassailable, the postwar constitutional framers also gave formal recognition to the role that democratic political parties play in the "political will formation of the people" (Article 21, Basic Law). Yet, mindful of the destabilizing effect that political parties had had during the years of the Weimar

40 As they are when voting in the *Bundesrat* itself.

41 Lehmbruch, *Parteienwettbewerb im Bundesstaat*, 79.

Republic, they were also distrustful of party politics, and the *Bundesrat*, composed as it was of executive government officials, was created not least as a counterweight to party competition.⁴²

From a comparative perspective, the German case is particularly instructive because it sheds light on a structural contradiction afflicting all federal systems, and parliamentary ones in particular. On the one hand, there is the organization of federalism with its rationale of cooperation and—in its particular German configuration—conflict avoidance. On the other hand, there is party politics with its rationale of competition, if not conflict. The question is, in the German case as elsewhere, whether second chambers can still perform the twin functions assigned to them: protect regional interests *and*—in the sense of sober second thought—tame partisan and ideological conflict.

The answer, it would seem, depends to a large extent on the existence of regional interests and identities, as well as on the effective and legitimate powers of the second chamber. In Canada, as we saw, given the insufficiency of its construction, the Senate at best might still provide some sober second thought. The protection of regional interests had, however, to migrate into the realm of inter-governmental relations (see Chapter 9). In the United States, as we saw as well, bicameralism has not been a protector of regional interests that are overwhelmed by a much stronger sense of nationalism. And at least at the current time it also has not been able to prevent deep ideological conflict and paralysis.

In the German case, partisanship soon began to overshadow federalism. Given the co-decision powers of the *Länder* governments in the *Bundesrat*, *Land* elections became dominated by national issues. The electorate understood very well that the majority powers of the national government could be constrained by opposing majorities in the *Bundesrat*, a situation that often signalled imminent government change in the next federal election. Contrary to the political traditions of parliamentary federalism in some of the British settler colonies, however, this role of the second federal chamber as a countervailing force in national politics has not generally been seen as a violation of political legitimacy and responsible government.

On the contrary, it has even been praised as an important element of checks and balances in a parliamentary democracy characterized by the interplay of government and opposition. The opposition in parliamentary systems has little control over the political agenda as long as the governing majority prevails. The German *Bundesrat* provides it with what is potentially an effective tool of control.

42 The classical argument in this regard has been Lehmbruch, *Parteienwettbewerb im Bundesstaat*. For critical assessment, see Roland Sturm, "Party Competition and the Federal System: The Lehmbruch Hypothesis Revisited," in Charlie Jeffery (ed.), *Recasting German Federalism: The Legacies of Unification* (London: Pinter, 1999), 197–216.

The *Bundesrat* and the Mediation Committee have generally served their constitutional roles constructively. Whether the predominance of second-chamber partisanship vitiates a more genuinely federal role for the *Bundesrat* depends on the degree to which partisan preferences and electoral outcomes in the *Länder* reflect regional differences of policy choice and a commitment to federal balance as well. While such differences may not have been very pronounced during the earlier years of the West German Republic, they have become more substantial now, after reunification, as differences between west and east, large and small, rich and poor. This in turn has strengthened the federal character of the *Bundesrat*, but it has also on occasion allowed the government in power to strike policy alliances across partisan lines. In this sense, then, the German *Bundesrat* still must be regarded as the most federal of second chambers.

In one respect, though, the *Bundesrat* did not fulfill the role its designers had foreseen. It has not prevented German federalism from becoming highly centralized, even becoming a case of "unitary federalism."⁴³ Indeed, it has somewhat paradoxically facilitated that centralization by lessening local resistance to central authority. Since the *Länder* governments know that they retain such direct input into central government decisions, they have less reason to resist assumption of responsibilities by that government.

The European Union: A Case of Second-Chamber Governance

As we have emphasized, the normal way of designing federal institutions has been by way of bicameralism—complementing popular representation in one chamber with regional representation in the other chamber. In the case of the Bismarckian constitutions of 1866 and 1871 we have seen how the German princes went the opposite way. Their primary interest was mutual accommodation in the *Bundesrat*. Parliamentary representation in the *Reichstag* was to play second fiddle. European institution-building followed a similar rationale and path. The member states sought to establish a common market on the basis of intergovernmental agreement. Next to the governing Council of Ministers, the European Parliament had limited powers and served primarily as a forum for public debate. As the EU increasingly acquired the status of a supranational polity, this lack of full parliamentary accountability came to be seen as a serious "democratic deficit."⁴⁴

43 This argument was made quite early on; see Konrad Hesse, *Der unitarische Bundesstaat* (Karlsruhe: C.F. Müller, 1962). Hesse's argument essentially focused on the peculiar construction of the *Bundesrat*, the role of a centralized party system in the federal system, and on the societal demands for uniform social-policy goals.

44 See, for example: Giandomenico Majone, *Europe as the Would-Be World Power: The EU at Fifty* (Cambridge: Cambridge University Press, 2009), Chap. 6; Fritz W. Scharpf, "Legitimacy in the Multilevel European Polity," *European Political Science Review* 1.2 (2009): 173–204.

Toward Treaty Federalism

The process of European integration was set in motion at the Messina Conference of 1955, which resulted in the founding Treaties of Rome in 1958. From the very beginning, the idea was to move beyond a system of mere intergovernmental cooperation. Jean Monnet, the driving force behind the process and its institutional outcome, had been deputy secretary-general of the interwar League of Nations, and he was well aware of the inherent weaknesses of confederal intergovernmentalism. Driven by the same concerns as led the Philadelphia Convention to construct a more “energetic” central government, Monnet sought to construct an effective union. Following the pattern of the High Authority in the already established European Coal and Steel Community (ECSC), he was convinced that successful market integration depended on a strong central executive. At the same time he was persuaded that the legitimacy of a community among democratic nation-states required at least the semblance of a full set of democratic institutions, including a parliament and an independent court of justice.⁴⁵

And indeed, the institutions created by the Treaties of Rome at first glance very much looked like those of a federal state: policy initiatives would be the prerogative of the executive European Commission; and two legislative bodies would make the decisions—a parliament representing the European populations and a council representing the member states. A European Court of Justice would uphold the letter and spirit of the treaties. According to that letter and spirit, the European Community (European Union since 1993) would be a hybrid system of intergovernmental politics and supranational policy integration.

The initial postwar euphoria about a truly transnational European peace project quickly gave way to a reassertion of nation-state interests, perhaps best expressed by French president Charles de Gaulle’s later formula of a “Europe of fatherlands” (*Europe des patries*). For this reason, the balance of powers within the European institutional set-up unfolded in marked difference from what one might have expected in an emerging European federal state.

In essence, the Council of Ministers (now officially the Council of the European Union) became the most powerful organ of legislative and regulatory decision-making. At the outset, it appeared intergovernmental in its procedural loyalty to mutual agreement under the treaties, but even then supranational in its commitment to the adoption of a truly European body of secondary law. With the replacement of unanimity requirements with qualified majority voting in an ever-growing number of policy areas, the Council increasingly took on the characteristics of a supranational policy-maker under the treaties. The power to amend the treaties, of course, remained reserved to the summit meetings of the heads of state and government, now the European Council, where unanimity prevails (see Chapter 10).

45 See John Pinder, *The European Union* (Oxford: Oxford University Press, 2001), 9–10.

From a federalist perspective, the roles of Council and Parliament appear reversed. While the Council performed the role of a first chamber, setting the legislative agenda on the basis of European Commission initiatives, the European Parliament (EP) clearly was designed as a weaker chamber—and has remained so even though every treaty change since the mid-1980s has upgraded its powers. Directly elected only since 1979, the Parliament did not (and still does not) initiate legislation and it had limited budgetary powers. Most fundamentally, there was (and still is) only a weak sense of responsible government. It appoints and can dismiss the Commission in its entirety, and it now elects the Commission president, but it has few means to scrutinize the Commission's ongoing business—individual commissioners “are held to account by their own national parliaments.”⁴⁶

Over time the EP has gained extensive co-decision powers for most policy areas, which means that legislative acts in these areas require approval of both Council and Parliament. Under the current *acquis communautaire* of the Lisbon Treaty, as we will see, the EP has gained near-parity in its legislative powers alongside the Council. But it would be an exaggeration to say that it has assumed a role generally attributed to parliaments in conventional federal democracies, and it probably never will or even should. The European Union is a “singular system with singular institutions”⁴⁷—a novel case of treaty federalism, the rationale of which is anchored in a voluntary commitment among sovereign nation-states to create a supranational governance regime in areas of common interest. The Council, then, inevitably takes the place of primary decision-maker.

From QMV to Double Majority

Council proceedings were designed to move from intergovernmentalism to supranationalism in two stages. For a transition period, the Council was to function like a diplomatic conference, requiring unanimous agreement among member states for most decisions. After a transition period, the Treaties foresaw the increased use of weighted or **qualified majority voting** (QMV) similar to the German *Bundesrat*. Toward the end of the transition period, however, French president Charles de Gaulle strongly objected to QMV—even withdrawing from further participation in Council proceedings in protest. The so-called Luxembourg Compromise of 1966 then effectively suspended the adoption of QMV. The member states agreed that unanimity should prevail despite treaty stipulations whenever a member state declared a decision to be of paramount national interest. Since 1985 and the adoption of the *Single European Act* (SEA),

46 Charlotte Burns, “The European Parliament,” in Michelle Cini and Nieves Pérez-Solórzano Borragán (eds.), *European Union Politics*, 4th ed. (Oxford: Oxford University Press, 2013), 162–63.

47 Desmond Dinan, *Ever Closer Union: An Introduction to European Integration*, 4th ed. (Boulder, CO: Lynne Rienner, 2010), 263.

QMV has been re-established as the prevalent mode of decision-making for most matters relating to the single market.

While the adoption of QMV was contested because it constituted a qualitative jump from confederalism to federalism, the adoption of a weighted formula of representation was never in doubt. All participants agreed that a compromise had to be found between intergovernmental unanimity and majority rule on the basis of member-state equality. As in the German model, the formula reflected differences in size and population but gave additional weight to the smaller member states. The idea was to find a balanced scheme by which the larger jurisdictions could not entirely dominate the smaller ones, and the smaller ones could not gang up on the larger ones. This would require, though, adjustments for each successive round of enlargement. And with each round, the numbers game would become more complicated.

In the original Community of Six, the three largest member states—Germany, France, and Italy—each had four votes, the Netherlands and Belgium two, and Luxembourg one vote. A qualified majority decision was carried by 12 out of 17 votes. By 2004 and now with 25 member states, the formula of weighted votes as adopted by the 2003 Treaty of Nice ranged from 29 to 3, and a decision required 255 votes out of 345, representing a majority of member states. In addition, any member state could request verification that the qualified majority would represent at least 62 per cent of the European population. If this was not the case, the decision could not be adopted.

With further EU enlargement already looming, it became obvious that what effectively amounted to a complicated triple-majority procedure would no longer suffice as a mechanism for efficient and timely decision-making. As already pre-formulated by the constitutional draft treaty, the Treaty of Lisbon therefore radically changed the procedure. As of November 2014, and with a transition period until 2017 whereby member states can still demand to apply the Nice formula regarding a particular decision, the entire system of weighted representation has been replaced by a new double-majority voting system of member states and populations: decisions are carried by at least 55 per cent of Council members representing at least 65 per cent of the European population and a blocking minority must comprise at least four member states representing more than 35 per cent of the European population plus one member (Article 238 TFEU).

The preoccupation with numbers and qualified majority provisions conceals to a considerable extent the real nature of decision-making in the EU. All decisions are carefully prepared by a Committee of Permanent Representatives (COREPER), composed of senior civil servants from the national governments, before they reach the Council table (see Chapter 9). Once there, further efforts are made at avoiding a display of majority power. In marked contrast to the German *Bundesrat* again, but not unlike Bismarck's old Federal Council, proceedings in

the Council of Ministers are carried by a “highly ingrained culture of consensus.” Actual votes are rarely taken. Instead, negotiations continue until common agreement is reached or dissent is simply no longer voiced. Of all proposed legislation before the Council between May 2004 and December 2006, for instance, 85.5 per cent passed uncontested, with only 8.9 per cent receiving “no” votes and 5.3 per cent recording abstentions.⁴⁸

From a comparative federalism perspective this is quite significant: it represents institutional federalism modified and made palatable by procedural confederalism. It further underscores the significance of the EU as a case of treaty federalism, and in doing so—given its undeniable success in achieving an unprecedented level of transnational regional integration—it provides a corrective to the conventional assumption, first championed by the Americans, that governance by agreement cannot be efficient.

As we will see in the next chapter, important policy innovations in Canada also came into existence by agreement rather than majoritarian decision-making. Yet while intergovernmental relations in the Canadian case have to operate outside the constitutional framework of bicameralism and dual representation, they have been made the institutionalized centrepiece of EU governance. Despite these obvious differences, the shared procedural practice points to a “new form of non-unitary governance that departs from the classical American model.”⁴⁹

Second-Chamber Governance: More than Equal

As we noted earlier, the question for the designers in most of the classical federations had been whether to make the second chamber stronger, weaker or equal. We have also seen from the American case that a high level of autonomy and responsible governance already possessed by the constituent member units at the time of federation will likely result in a strong second chamber. In the case of the EU, composed of fully sovereign member states, the question logically came to be asked in reverse: how powerful would the European Parliament have to be made so that European governance dominated by the Council could be seen and accepted as legitimate?

Historically, this is understandable because the EU grew out of an intergovernmental treaty agreement, and the member states had no intention of giving up their position as “masters of the treaties.” In order to combat the widely criticized “democratic deficit,” however, the powers of the European Parliament have been upgraded over time, from non-binding consultation, to a formal cooperation

48 Jeffrey Lewis, “The Council of the European Union and the European Council,” in Michelle Cini and Nieves Pérez-Solórzano Borragán (eds.), *European Union Politics*, 4th ed. (Oxford: Oxford University Press, 2013), 151–52.

49 Thomas O. Hueglin, “Treaty Federalism as a Model of Policy Making: Comparing Canada and the European Union,” *Canadian Public Administration* 56.2 (2013): 200.

procedure whereby parliamentary decisions could still be overridden by the Council, to an ever more inclusive co-decision right now extending to virtually all policy areas as the ordinary legislative procedure (Article 289 TFEU).

As of Lisbon, one can say without exaggeration that the EP has become a legislator formally equal to the Council.⁵⁰ It now can propose amendments to the European budget in all of its aspects, and the ordinary legislative procedure now includes three parliamentary readings as well as an institutionalized process of conciliation between EP and Council analogous to that in the German Mediation Committee. But it is also no exaggeration to say that for at least two reasons the EP has nonetheless remained the weaker of the two legislative bodies.

One of these reasons is that the EP does not—and cannot—represent a common European identity, since no such identity has yet been established. There is no genuinely European party system. Instead, EP members elected from national party systems form political groups along ideological lines. The two strongest ones are social democratic and Christian democratic. By contrast with the members of the Council, who are well known nationally as leading politicians and government ministers, European parliamentarians usually remain outside the political limelight. Not least for this reason, the political weight of the EP is further weakened by notoriously low voter participation rates in European elections.

The other reason has to do with how the legislative process works in practice.⁵¹ One of the more surprising facts about the European legislative process is that the conciliation process only rarely has to be set in motion, because agreement is reached between EP and Council in most instances before the end of the second reading when the process would kick in. The reason for this in turn is the intense level of inter-institutional negotiation among a small number of key players that accompanies the entire legislative process and in which the EP has become an equal partner. In this process, however, the Council has a decisive advantage.

Legislative proposals come from the Commission, and the Commission has a special relationship with the Council in that it participates in all proceedings, from “working groups” and committee meetings to the official Council meetings themselves. Thus the Commission learns about member-state positions and possibilities for Council approval from the very beginning of the process. The role of the EP therefore and inevitably is more reactive than agenda-setting. It can amend or even block a proposed legislative act. Adamant about asserting itself as an equal participant in European governance, and aided by the serious work done in its committees, the EP may even play a crucial role of mediator when dissent arises in the Council. But it cannot press ahead with initiatives of its own. In this sense, then, from the perspective of comparative federalism, the EU can be characterized as a system of second-chamber governance.

⁵⁰ See Burns, “The European Parliament,” 159–71.

⁵¹ See Dinan, *Ever Closer Union*, 304–10.

Imitations and Variations

The unelected Canadian Senate and European council governance are unique cases of dual representation in federal systems. Apart from its impact upon the design of the European Council of Ministers, the German model of governmental second-chamber representation also has not found widespread imitation, although a variation of it has been adopted in South Africa: members of the National Council of Provinces are indirectly elected by the provincial legislatures, but in matters affecting provincial powers each provincial delegation has only one vote, which must be cast as instructed by the provincial legislatures.

Given its historical status as the first instance of a second chamber in modern federations, the American senate model has not been replicated as often as one might think either. Directly elected senates with equal representation exist only in Australia, Nigeria, Argentina, and Brazil. Switzerland also belongs to this category since the cantons, which determine the mode of election, have all switched to direct election of the members sent to the upper-chamber Council of States (*Ständerat*).⁵³ Switzerland's conversion to a senate-type second chamber confirms that "the presence of an upper house supposedly representing the regional units does not make much of a difference, unless it is made up, as in Germany's Federal Council, by representatives of the regional governments."⁵⁴ Mexico also belongs in this category, with the minor variation that additional senators are elected on a proportional basis from the country as a whole.

A third group of federations has followed the original American design: members of second chambers are elected indirectly by the legislatures of the constituent units but then (contrary to South Africa) have a free mandate. Seat distribution may be weighted as in Austria, or proportional as in India.

A fourth and last group (apart from the unicameral federations mentioned above) consists of federations where a mixed design of second chambers has been adopted. This is particularly prevalent in recent federations such as Belgium and Spain and reflects the difficult compromises necessary to reach agreement on a common federal design. In Belgium, for instance, 40 senators are directly and proportionally elected; an additional 21 senators are indirectly elected, 10 each

⁵² See Christina Murray, "Republic of South Africa," in Katy Le Roy and Cheryl Saunders (eds.), *Legislative, Executive, and Judicial Governance in Federal Countries* (Montreal: McGill-Queen's University Press, 2006), 268.

⁵³ Wolf Linder and Isabelle Steffen, "Swiss Confederation," in Katy Le Roy and Cheryl Saunders (eds.), *Legislative, Executive, and Judicial Governance in Federal Countries* (Montreal: McGill-Queen's University Press, 2006), 296–97.

⁵⁴ Paolo Dardanelli, "Federal Democracy in Switzerland," in Michael Burgess and Alain-G. Gagnon (eds.), *Federal Democracies* (Abingdon, UK: Routledge, 2010), 159.

from the Flemish and French community councils, and one from the German community council (see Chapter 5); and together these senators can appoint ten further senators, six Dutch-speaking and four French-speaking.⁵⁵

There are other significant variations as well. We briefly discuss four cases that stand out both for innovative variation and for casting additional light on the general issue of second chambers as “federal” chambers in the modern context of party politics.

Parliamentary Bicameralism in Australia

Strong upper houses were an established part of the system of government prevailing in the Australian colonies in the late nineteenth century, and it would not have been surprising if strong bicameralism had been adopted for the new national government on those grounds alone. As in the United States, this predisposition coincided with a confederal emphasis on the integrity of the states and led to the creation of a powerful Senate in spite of Australia’s Westminster parliamentary inheritance.⁵⁶ The strongly democratic basis of Australian politics reinforced the inclination for a popularly elected version of the American model some years before the Americans themselves made that transition; however, it was not sufficiently strong to overcome the insistence of the smaller states that equal representation in at least one chamber was a prerequisite of union.⁵⁷

The compromise thrashed out through several rounds of bargaining and a few referendums was this: there would be equal representation, and there would be equal powers, except that the Senate would not be allowed to initiate or amend money bills. Such a degree of equality poses potential problems for a parliamentary system, and thus another problem haunting the constitutional designers was how disagreement and deadlock between the two houses would be resolved. In the American system this was not a problem because the executive was directly elected and not directly responsible to the Congress. In a parliamentary federation, however, the government depends on majority support, and deadlock between the two chambers would paralyze the system. It is here that the Australian designers found their most innovative solution. Section 57 of the Commonwealth Constitution stipulates that should a bill be rejected twice by the Senate, the governor-general may dissolve both chambers—including the whole

55 See the overview in André Lecours, “Belgium,” in Ann Griffiths and Karl Nerenberg (eds.), *Handbook of Federal Countries, 2005* (Montreal: McGill-Queen’s University Press, 2005), 58–72.

56 L.F. Crisp, *Australian National Government*, 5th ed. (Melbourne: Longman Cheshire, 1983), 19.

57 Despite the fact that some of the most prominent framers not only argued that small-state/large-state conflicts would be rare, but that party discipline would come to render the notion of a house of state representatives nugatory. Crisp, *Australian National Government*, 21.

of the normally staggered Senate—and allow the government of the day to put the issue to the people. Should that double-dissolution election fail to resolve the matter, a joint sitting of both houses would be called. Given the larger size of the lower house and its single-member electoral system, a joint sitting would likely overwhelm the Senate negative. Only India has subsequently adopted a similar procedure, albeit without prior dissolution. Whether these two-stage procedures function optimally is another question. Some would argue that the infrequency of double-dissolution elections (only five in over a century) and the extreme rarity of joint sittings (only ever held once) are indicative of inadequate design.⁵⁸

The question of whether the Australian Senate could or should legitimately challenge parliamentary majority governance remained a divisive issue and produced a political crisis in 1975, when the opposition-controlled Senate refused to pass the government's annual appropriations bill.⁵⁹ The governor-general exercised his "reserve" powers under the constitution, dismissed the prime minister, called upon the leader of the opposition to form a new government, and then promptly proceeded to double dissolution upon the advice of that newly commissioned prime minister. A joint sitting did not become necessary because the new government won majorities in both houses. While this tested Australian constitutionalism, it was overwhelmingly a matter of partisanship, not federalism.

In the 1980s and 1990s, the major parties lost their hold on the Senate as proportional representation (introduced in 1949) underpinned a drift to a more multi-party politics. This has given the Senate a dynamic new role, but not a federal one. If the Australian Senate was intended to be a federal "House of the States," this may well be described as the "great failure of the constitution."⁶⁰ The Australian Senate has much more to do with creating "divided government" than with federalism.⁶¹

Ambivalent Bicameralism in Spain

During the process of democratization after the Franco dictatorship, a delicate balance had to be struck between the need to stabilize Spain as a democratic nation-state and the need to accommodate the quest for regional autonomy. Following established federal practice, the national legislature (*Cortes Generales*) was made bicameral, consisting of a parliamentary Congress (*Congreso*) and a Senate (*Senado*). However, the role of the Senate has remained limited.

58 See Jack Richardson, *Resolving Deadlocks in the Australian Parliament* (Canberra: Department of the Parliamentary Library, Parliament of Australia, 2000).

59 A bill constitutionally required to authorize government spending.

60 Crisp, *Australian National Government*, 330.

61 John Uhr, "Generating Divided Government: The Australian Senate," in Samuel C. Patterson and Anthony Mughan (eds.), *Senates: Bicameralism in the Contemporary World* (Columbus: Ohio State University Press, 1999), 93–119.

Section 69(1) of the Spanish Constitution declares the Senate to be a “House of territorial representation.” Yet three-quarters of senators, 208 in all, are elected from the same electoral districts as the members of the Congress, the subnational provinces, and not from the 17 autonomous communities (ACs).⁶² Only one-quarter of senators, currently 56, are selected by the regional parliaments. Each AC appoints one senator plus one more for every million inhabitants. Effectively this means that the “Spanish upper house mainly performs functions that duplicate those of the . . . lower house.”⁶³

The Spanish upper house in this respect may not be all that different from other senate-type second chambers. Two other features, however, make it distinct in a more significant way. First, the Spanish Senate has only a suspensive veto. As Section 74(2) of the constitution stipulates, legislative decisions have to be taken by both houses. In case of disagreement, a “Mixed Committee” composed of an equal number of members from both houses is established to bring about agreement. If that is the case, both houses have to vote again; if not, “the Congress shall decide by overall majority.” Second, and perhaps as a compensation for their relative weakness in the central decision-making process, the ACs themselves can directly initiate legislation in the *Cortes*. Under Section 87(2) of the constitution, regional parliaments “may request the Government to adopt a bill.” That sounds meek, but such initiatives have been successful on occasion.

The Spanish Senate is widely considered a failure, and reform aiming at a second chamber representing the autonomous nationalities and regions more fully and directly has been on the agenda almost since the inception of the Spanish Constitution in 1978.⁶⁴ However, as we shall discuss in Chapter 10, obstacles to reform are substantial.

Second-Chamber Federalization in India?

As we have noted several times already, representation of collective territorial interests, particularly in senate-type second chambers, typically is overshadowed or even superseded by party politics. One important reason is the absence of strong regional parties at the national level. Bicommunal Belgium may be the exception to the rule in that regional parties dominate national politics. India in

62 Four senators are elected from each province; the various islands and North African cities belonging to Spain elect fewer senators—three, two, or one, according to their size.

63 Luis Moreno and César Colino, “Kingdom of Spain,” in Luis Moreno and César Colino (eds.), *Diversity and Unity in Federal Countries* (Montreal: McGill-Queen’s University Press, 2010), 301–2.

64 Carles Viver, “Spain’s Constitution and Statutes of Autonomy: Explaining the Evolution of Political Decentralization,” in Michael Burgess and G. Alan Tarr (eds.), *Constitutional Dynamics in Federal Systems: Sub-National Perspectives* (Montreal: McGill-Queen’s University Press, 2012), 219.

turn may provide an example of how the rise of regional parties has contributed to at least some degree of second-chamber federalization.

Contrary to its official name, India's Council of States (*Rajya Sabha*) is an indirectly elected senate with powers co-equal except for money bills. Under Article 80, its number of members is constitutionally limited to 250. Twelve of these are nominated by the president—individuals chosen in recognition of contributions to literature, science, art, and social service. The remaining 238 are allotted to states and union territories according to a weighted formula based on population size and laid down in the Fourth Schedule of the constitution.⁶⁵ Under this formula, seat allotments currently range from 1 to 34, which is thus much more in line with the principle of proportionality than is vote distribution in the German *Bundesrat* or the European Council of Ministers.

While the indirect elections of *Rajya Sabha* members broadly follow party lines, state legislatures may also elect members simply for reasons of political patronage, and since 2003 may even draw them from party supporters living outside the state they are supposed to represent.⁶⁶ It is clear, then, that partisan interests dominate over regional concerns, and, given the degree of unequal representation, particularly those anchored in the larger states. The *Rajya Sabha* even has on occasion sanctioned, by virtue of a two-thirds majority under Article 249 of the constitution, national legislation intruding upon the enumerated powers of the states "in the national interest."

However, there has been a rise of strong regional parties more recently, one of the consequences of the ongoing process of redrawing the state boundaries of the Indian federation along cultural-linguistic lines. This process began in 1956 and has resulted in the creation of 14 new states since then—with several more cases pending. The arrival of regional parties and party coalitions at the centre may not have had a dramatically transforming impact upon the *Rajya Sabha*, which is still "seen as representing political party priorities at the expense of regional and state interests."⁶⁷ Yet by playing its part of forcing "the incumbent government and the *Lok Sabha* [lower house] to rethink issues,"⁶⁸ a more regionally fractured upper house also may have contributed to move India's federal system from overbearing central control to a more "cooperative union."⁶⁹

65 Schedules are executive laws regulating the operation of government and bureaucracy appended to the constitution.

66 This and the following is based largely on Dhavan and Saxena, "Republic of India," 173–76.

67 Dhavan and Saxena, "Republic of India," 176.

68 Dhavan and Saxena, "Republic of India," 166–97.

69 See Akhtar Majeed, "Republic of India," in John Kincaid and G. Alan Tarr (eds.), *Constitutional Origins, Structure, and Change in Federal Countries* (Montreal: McGill-Queen's University Press, 2005), 202–5.

Senate Dominance in Brazil

Beginning with the American model, we have so far chiefly emphasized the deficiency of second chambers with regard to their "federal" character and effectiveness. We end our discussion of dual representation with a case where the opposite is true: second-chamber dominance and the obstruction of necessary national objectives and democratic purpose. This is the case of Brazil, which invites us to rethink the tension that exists in federal systems between majoritarian democracy and the protection of particular regional interests. As we have noted, federalism characteristically modifies the operation of democracy in a less majoritarian direction, particularly when strong bicameralism is in operation. While first or parliamentary chambers are typically "*demos-enabling*," as Alfred Stepan puts it, in the sense of proportional one-person-one-vote equality, second chambers are "*demos-constraining*" due to the overrepresentation of less populous member units according to the principle of territorial equality.⁷⁰ Both the Brazilian and Argentinian cases illustrate this clearly.⁷¹

This anti-majoritarian tendency is much stronger in Brazil than elsewhere.⁷² The bicameral Brazilian Congress consists of the Chamber of Deputies (*Camara dos Deputados*) and the Federal Senate (*Senado Federal*). Both are malapportioned. The Senate is composed of directly elected members, three senators for each of the 27 states. While this provision appears to be no more than a conventional emulation of the American model, it contains much historical baggage that largely accounts for the inefficiency and fiscal irresponsibility attributed to the Brazilian federal system.

Prior to the adoption of the 1988 democratic federal constitution, in 1978 the military regime had created two additional states in the under-populated north, and it had also fused two of the more populous states of the south into one. At the same time, it had also changed the formula of representation in the lower house in favour of the poorer and less populous states. The strategy was to shore up traditional and clientelist support in underdeveloped and rural parts of the country against mounting civil-society opposition in the more developed and urban parts. Availing themselves of a solid majority in the constituent assembly of 1986–88, then, the delegates from these poorer and less developed states not only admitted three more similar states to the union, but they also affirmed and even increased the powers of the Senate, in which they would control 74 per cent of the

70 Alfred Stepan, "Federalism and Democracy: Beyond the U.S. Model," *Journal of Democracy* 10.4 (1999): 19–34.

71 On Argentina, see Jorge P. Gordin, "Patronage-Preserving Federalism? Legislative Malapportionment and Subnational Fiscal Policies," in Jan Erk and Wilfried Swenden (eds.), *New Directions in Federalism Studies* (London: Routledge, 2007), 68–82.

72 On this and the following, see Alfred Stepan, "Brazil's Decentralized Federalism: Bringing Government Closer to the Citizens?" *Daedalus* 129.2 (2000): 154–69.

seats as compared to 43 per cent of their population base. Moreover, a weak party system typical of presidentialism means that senators put the parochial interest of their own state or locality first.⁷³

This would not be so significant were it not for the Senate's extraordinary power. In addition to a full range of powers matching those in the lower house, the Senate enjoys a number of exclusive competences. The most important of these are the appointment of one-third of the judges reviewing federal expenditures; veto rights for the other third; approval of the federal government's foreign borrowing levels; and, most importantly, authorization of international borrowing by the states.⁷⁴ This is what led to the fiscal and debt crisis already noted in Chapter 7. During the Cardoso presidency, the fiscal order was partially restored when the federal government took over state debts in return for privatizing state banks under Central Bank control. But the structural problem of domineering Senate overrepresentation persists: rather than alleviating the plight of the poorer and weaker by giving them a disproportionate voice, it continues to play into the hands of "precisely those states with particularly unequal income distribution and strong traditions of local oligarchic control."⁷⁵

73 Jonathan A. Rodden, *Hamilton's Paradox: The Promise and Peril of Fiscal Federalism* (New York: Cambridge University Press, 2006), 201–3.

74 Stepan, "Brazil's Decentralized Federalism," 149.

75 Stepan, "Brazil's Decentralized Federalism," 165.

Intergovernmental Relations

SEARCHING FOR STABLE SOLUTIONS, THE DESIGNERS of federal systems focused on formal constitutional rules. Second-chamber representation would, it was assumed, provide the member units with a formal voice in national legislation. The division of powers prescribed what each level of government could do on its own. Any adjustment or change over time would have to come from formal constitutional amendment deliberately made difficult by a high threshold of agreement (see Chapter 10). Little or no attention was given to the need for sub-constitutional arrangements for intergovernmental coordination and cooperation.

Intergovernmental relations (IGR) as an ongoing and mostly informal practice in federal systems developed as a response to the much greater need for coordination than was originally envisaged. Of course, the divisions of power were never as clear or watertight as had been intended, and areas of concurrent or shared jurisdiction inevitably existed from the outset. These realities became qualitatively more significant in the twentieth century and in particular after the emergence of the modern welfare and regulatory state from the 1930s onwards. The rising demand for social policies spawned a new practice of shared programs and joint financing schemes. As we noted in Chapter 7, social policy, which was generally in the domain of subnational governments, increasingly depended on fiscal transfers. More recently, pressure to achieve improved levels of economic integration in federal systems has given a fresh impetus to intergovernmental cooperation,¹ as have other concerns requiring a whole-of-government approach, such as terrorism or disaster management. As a consequence, intergovernmental relations came to drive modern federal systems as much as, or even more than, the formal constitutional set-up of divided powers and the bicameral legislative process. This is reflected in the “trend towards institutionalisation of IGR.”² These intergovernmental relations predominantly operated vertically, that is, between the central government and the governments of the constituent units (individually or collectively); however, they also may operate horizontally, that is, between the constituent units themselves. Out

¹ See Douglas M. Brown, *Market Rules: Economic Union Reform and Intergovernmental Policy-Making in Australia and Canada* (Montreal: McGill-Queen's University Press, 2002).

² Johanne Poirier and Cheryl Saunders, “Comparative Reflections on Intergovernmental Relations,” in Rupak Chattopadhyay and Karl Nerenberg (eds.), *Intergovernmental Relations in Federal Systems* (Ottawa: Forum of Federations, 2010), 4.

of these developments arose the concepts of **cooperative federalism**, **collaborative federalism**, **pragmatic federalism**, and **administrative federalism**, describing some of the ways in which adjustment and engagement have occurred between the levels of government. As we see in this chapter, patterns of IGR vary significantly, depending on such factors as whether the federation in question is presidential or parliamentary, has a council- or senate-type second chamber, and is more centralized or more decentralized.

Patterns of Cooperation

Intergovernmental relations generally involve a fluid combination of conflict and cooperation. There is a competitive predisposition in all federal systems—between the two levels of government and among the member units. Such competitiveness is often played up for electoral purposes, and it is sometimes accentuated by differences about policy priorities, divergent economic interests, or even more serious differences about national identity and the role of federalism in addressing these questions. At the same time, however, federal systems cannot survive without considerable levels of cooperation. Although we will show an important exception to this, intergovernmental cooperation “works in substantially similar ways in many if not most federal systems.”³ And even when the mechanisms are different, the outcomes can be similar.⁴

Executive Federalism

A common characteristic of intergovernmental relations is their executive nature. While the constitutional division of powers focuses on law-making and the roles legislatures play at different levels of government, intergovernmentalism is driven by the executive branch of government. Departmental policy specialists from both levels of government meet for the purpose of regulatory fine-tuning in areas of overlapping jurisdiction. Senior public officials meet in order to discuss the administration of joint programs. Ministers or senior civil servants meet in order to discuss how to set up such programs.

When conflicting visions of federalism exist and the allocation of powers is contested, intergovernmental relations become politicized. Functional needs of policy coordination become transformed into intergovernmental disputes about the existing condition and future direction of the federal system. Summit meetings of political leaders replace those among policy specialists. It is specifically

³ Alan Trench, “Intergovernmental Relations: In Search of a Theory,” in Scott L. Greer (ed.), *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (Basingstoke, UK: Macmillan, 2005), 254.

⁴ Herman Bakvis and Douglas Brown, “Policy Coordination in Federal Systems: Comparing Intergovernmental Processes and Outcomes in Canada and the United States,” *Publius* 40.3 (2010): 484–507.

this politicized form of intergovernmentalism at the leadership level that the Canadians call executive federalism.

Typically carried out behind closed doors, the secretive nature of executive federalism is often criticized as a form of governance that emphasizes regulatory efficiency over democratic legitimacy.⁵ From a public administration perspective comes the opposite critique: the negotiated deals among different levels of government blur responsibilities and typically result in compromises constituting decidedly sub-optimal solutions. And finally, there are some who are more fundamentally opposed to this type of executive federalism because it violates the constitutional principle of divided powers. As we will see presently, the current Canadian government has all but abandoned summit meetings in the name of classical or dual federalism.

While all this is at least partially true, the necessity for some procedural mechanism of intergovernmental relations cannot be denied. Exactly what that mechanism is or should be, however, is difficult to discern due to the mostly informal character of intergovernmental relations. This informal character also requires paying more attention to the vicissitudes of shifting partisan politics than in other and more formalized aspects of federalism. It is nevertheless possible to distinguish some basic patterns.

Cooperation in Policy-Making vs. Coordination of Policy Administration

The first distinction to be made is between policy-making and program administration. Since the laws made at each level of government in a federal system almost inevitably affect each other in an overlapping or concurrent way, all federations have to rely on policy coordination. To put it simply, if there are federal and state highways, coordinative planning is necessary so that they connect. In every federation, there are hundreds of intergovernmental meetings of this nature. Carried out by like-minded policy specialists from ministerial bureaucracies and other government agencies, this form of intergovernmental relations is generally cooperative, as it applies laws and regulations already in existence. The process nevertheless can be complex and drawn-out, as agreement may be needed not only between different government levels but also from other agencies with regulatory authority, or even private stakeholders.

When it comes to actual policy-making, the dynamic of intergovernmental relations changes. Here the question of whether cooperation prevails

⁵ A classic statement of this is Donald V. Smiley, "An Outsider's Observations of Federal-Provincial Relations among Consenting Adults," in Richard Simeon (ed.), *Confrontation and Collaboration: Intergovernmental Relations in Canada Today* (Toronto: Institute of Public Administration of Canada, 1979), 105-6; cf. Alain-G. Gagnon, "Executive Federalism and the Exercise of Democracy in Canada," in Michael Burgess and Alain-G. Gagnon (eds.), *Federal Democracies* (Abingdon, UK: Routledge, 2010), 232-50.

or competitiveness comes into play depends on a wide range of factors that include ideological and partisan differences, regional diversity, and, most importantly, the question of who is paying. Intergovernmental relations pertaining to policy-making, the creation of joint programs or the regulation of shared responsibilities will typically be carried out by senior government officials on behalf of their elected ministers, by the ministers themselves, or even by the government leaders. Particularly if the latter is the case, intergovernmental relations can become a matter of politics rather than policy, as governments at each level seek to pursue their own political agenda and in doing so want to be seen as the prime providers of public services by their respective electorates.

In this chapter, we focus on this political dimension of intergovernmental relations. The rationale for this is quite obvious: federalism is a system of governance based on divided and shared rule. The constitutional division of powers at least in principle seeks to determine what the constituent units of a federation may do separately and what should apply to all members in common. Because the boundaries between the one and the other routinely blur in practice, and because, as we just saw in the previous chapter, second chambers provide only limited possibilities for the mutual determination of a common vision, intergovernmental relations essentially must be understood as a political process complementing the formal provisions of power division and bicameralism in federal systems.

Consultation vs. Joint Decision-Making

Another distinction must be made between consultation and joint decision-making. In all federal systems, government officials and elected leaders talk to each other on an ongoing basis, either during regularized periodical meetings or on an ad hoc basis by just picking up the phone. Such contacts are important for the communication of policy intentions, or even for the coordination of policy programs, and are a major lubricant of cooperative federalism.⁶ But these contacts and meetings are entirely *consultative* in that any decisions are then made separately by the governments at each level.

In some federations, however, there are requirements for **joint decision-making**: new policy programs or changes to already existing ones need binding intergovernmental agreement. Such requirements can be formal as in Germany, where the so-called joint tasks are even constitutionally enshrined and thus part of the power division scheme (see Chapter 6). More typically,

6 An umbrella term for the practical interaction of governments in a federalism, which "does not imply that intergovernmental relations are always peaceful and friendly"; Daniel J. Elazar, "Cooperative Federalism," in Daphne A. Kenyon and John Kincaid (eds.), *Competition among States and Local Governments: Efficiency and Equity in American Federalism* (Washington, DC: Urban Institute Press, 1991), 69.

they are informal and driven by policy need and the impossibility of unilateral action due to jurisdictional boundaries and fiscal imbalance. Collaborative federalism can be said to exist when the two levels of government exercise authority through jointly constituted bodies or procedures.⁷

Which pattern of intergovernmental relations predominates in any given federal system—consultative or binding, formal or informal, driven by politics or policy-oriented—in turn and to a considerable degree depends on the institutional environment. As we already noted in the initial characterization of our four basic models, among the main variables affecting the cooperative or competitive nature of intergovernmental relations are the presidential or parliamentary form of government as well as the legislative or administrative division of powers (see Table 3.3). These variables also determine the nature of intergovernmental relations more generally.

Presidential vs. Parliamentary Federalism

While there are probably more intergovernmental meetings in the United States than in any other of the classical federal states, they do not constitute as important a part of the politics of federalism as is the case elsewhere. This is a consequence of the presidential form of government. Because of the “separation of powers” between the three branches of government, the executive cannot easily make binding intergovernmental deals, as these may then be overturned by the legislative branch. Because of this diffusion of power, the kind of executive federalism that we find in parliamentary systems does not typically exist in presidential ones. And because the US “is the only advanced industrial state with a complete separation of power system rather than some kind of parliamentary element,” this makes that country rather an outlier among the main federations.⁸ American intergovernmental relations are almost entirely conducted for the purposes of policy coordination, at the administrative levels of government—or what in the US is called “administrative federalism” or “intergovernmental management.”

In federations where a parliamentary system of government prevails—such as Canada, Germany, India, Spain or Australia—on the other hand, the executive

7 Martin Painter, “Multi-Level Governance and the Emergence of Collaborative Federal Institutions in Australia,” *Policy and Politics* 29.2 (2001): 138–39.

8 Alberta Sbragia, “Intergovernmental Relations or Multi-level Governance? Transatlantic Comparisons and Reflections,” in Edoardo Ongaro, et al. (eds.), *Governance and Intergovernmental Relations in the European Union and the United States: Theoretical Perspectives* (Cheltenham, UK: Edward Elgar, 2010), 20.

9 Confusingly, Americans have adopted the term “executive federalism” to mean a particular version of these administrative relations; see Frank J. Thompson, “The Rise of Executive Federalism: Implications for the Picket Fence and IGM,” *American Review of Public Administration* 43.1 (2013): 3–25.

and legislative branches are fused: the prime minister or chancellor, together with the members of cabinet, sits in parliament as the leader of the parliamentary majority. Intergovernmental executive deals are not normally in danger of being overturned.¹⁰ This concentration of power in parliamentary federations facilitates intergovernmental collaboration in the form of binding, contract-like agreements. At the same time, however, it also encourages a much more politicized form of intergovernmental relations. There is a built-in tension between the direct and exclusive accountability of executive leaders to their respective parliaments, and the federal division of powers with its need for cooperation and compromise.¹¹

Integrated vs. Divided Federalism

In Chapter 2, we distinguished integrated systems of federalism, where the sub-national governments directly participate in national law-making, from divided systems of federalism, where they do not. Logic would suggest that the need for intergovernmental collaboration is higher in divided systems. In practice, however, this is not necessarily so. Despite its integrated character, German federalism relies on a dense network of intergovernmental relations, which points to a political culture of policy harmonization and conflict avoidance far less prominent in some of the divided or legislative federal systems. In South Africa, with its similarly constructed system of integrated federalism, such a political culture is largely absent and intergovernmental collaboration is tenuous at best.¹²

By the same token, the character and intensity of intergovernmental relations also vary across divided systems of federalism such as Canada and the United States. In fact, whereas “working around the constitution” through intergovernmental bargaining and agreement is a defining characteristic of Canadian federalism,¹³ it is entirely absent in American federalism.

The difference has not so much to do with the presidential or parliamentary form of government as with the effective balance of power between the two levels

¹⁰ This may be not so obvious in the case of coalition or minority governments.

¹¹ See Richard Simeon and Amy Nugent, “Parliamentary Canada and Intergovernmental Canada: Exploring the Tensions,” in Herman Bakvis and Grace Skogstad (eds.), *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, 3rd ed. (Don Mills, ON: Oxford University Press, 2012), 59–78.

¹² See Christina Murray, “Republic of South Africa,” in Katy Le Roy and Cheryl Saunders (eds.), *Legislative, Executive, and Judicial Governance in Federal Systems* (Montreal: McGill-Queen’s University Press, 2006), 281–82.

¹³ Thomas O. Hueglin, “The Bargaining Game: Canada as a New Model of Federal Governance,” in Gabrielle Appleby, Nicholas Aroney, and Thomas John (eds.), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2012), 186.

of government in both federations and the degree of difference that exists across the country. Aided by a strong sense of national unity, "working around the constitution" for necessary or desired policy innovation in the United States enabled the concentration of powers under a regime of congressional supremacy. With a deeply fragmented political culture and a far more tenuous sense of national unity in Canada, the federal government could not bring about policy innovation in the same way. It had to rely on intergovernmentally negotiated agreement.

Informal vs. Formal Arrangements

Even though they typically evolved as an informal practice without a constitutional basis, intergovernmental relations in most federations have become regularized as periodic events. This is particularly so in the case of meetings at the executive level involving cabinet ministers or even heads of government. Apart from meetings and conferences, intergovernmental relations can also be institutionalized in committees, boards, agencies, and councils for specific policy purposes such as infrastructure planning, regional development, or matters of fiscal management. Usually, such arrangements are more permanent in nature. Increasingly, intergovernmental arrangements and institutions are being given a quasi-legal status via formal intergovernmental agreements, which though not justiciable are regarded as binding in some way.¹⁴

In some instances, intergovernmental relations have become part of the constitutional order itself. In the aforementioned case of the German "joint tasks," a few policy areas were singled out for joint planning, decision-making, and financing (see Chapter 6). In some of the newer federations such as Belgium and South Africa, obligations for intergovernmental cooperation were written into the constitutional document right from the beginning.

Vertical vs. Horizontal Relations

Because constitutional divisions of power require coordination, and most federal systems have developed growing areas of shared jurisdiction and joint program financing, intergovernmental relations primarily take place *vertically* between different levels of government. It is also here that cooperation can quickly turn into confrontation and conflict when the establishment of such programs brings about a perceived or real shift in the original distribution of powers.

However, intergovernmental relations have also developed *horizontally*, among the governments of the constituent units of a federal system. In part, this has been occasioned by the need for policy coordination across the boundaries of regional

¹⁴ See Johanne Poirier, "Intergovernmental Agreements in Canada: At the Crossroads between Law and Politics," in J. Peter Meekison, Hamish Telford, and Harvey Lazar (eds.), *Canada: The State of the Federation 2002—Reconsidering the Institutions of Canadian Federalism* (Montreal: McGill-Queen's University Press, 2004), 425–62.

jurisdictions. Such coordination can remain at the level of intergovernmental agreement; it can involve all subnational jurisdictions or only some; and it can result in ventures of joint governance such as the Port Authority of New York and New Jersey, which oversees regional transportation and infrastructure.

Horizontal intergovernmentalism may also have important implications for the balance of power between the two levels of government. If jurisdictions cooperate so as to solve their collective-action problems, then demand or justification for intervention by the central government diminishes. Canada's provincial governments, for instance, have been able to harmonize their school systems with sufficient success to obviate federal government presence in the field altogether.¹⁵ And cooperation is an important strategic tool for negotiations with the national government, especially so in cases of conflict over the distribution of powers and finances. Intergovernmental summit meetings are often preceded by conferences or strategy sessions among regional government leaders or cabinet ministers who will try to agree on a common position before confronting the national government. The success of such efforts depends, of course, on the level of unity among regional governments—itsself in turn dependent on the degree of underlying common interest. Analysis suggests that sustained and effective horizontal engagement is all too rare in federal systems, and perhaps only really evident in Switzerland. There, among other things, the small scale of the individual jurisdictions makes cooperation between them almost unavoidable.¹⁶ Moreover, “horizontal co-operation is increasingly seen as the only way for cantons to resist the pressures of centralization.”

Intergovernmental Agency

Characteristic of federal systems is their carefully negotiated constitutional form. This is why the main focus of comparative federalism is on institutions, powers, fiscal arrangements, and judicial oversight. The informal and sub-constitutional character of intergovernmental relations, however, transcends this federal form—both by filling the gaps left by inevitable constitutional imprecision and by working around constitutional rigidity.

Informality opens the door to the vicissitudes of political leadership and personality. As has been pointed out for Canadian federalism, informality can turn

¹⁵ See Jennifer Wallner, *Learning to School: Federalism and Public Schooling in Canada* (Toronto: University of Toronto Press, 2014).

¹⁶ Daniel Bochsler, “Neighbours or Friends? When Swiss Cantonal Governments Cooperate with Each Other,” *Regional and Federal Studies* 19.3 (2009): 349–70; Nicole Bolleyer, *Intergovernmental Cooperation: Rational Choices in Federal Systems and Beyond* (New York: Oxford University Press, 2009).

¹⁷ Paolo Dardanelli, “Federal Democracy in Switzerland,” in Michael Burgess and Alain-G. Gagnon (eds.), *Federal Democracies* (Abingdon, UK: Routledge, 2010), 148.

the combination of “bureaucrats, politicians, and the judiciary into a potent dose of agency.”¹⁸ In this chapter more than in other chapters, therefore, we have to talk about political parties and their leaders as well as about political culture more generally.

“Cooperative” Federalism in the United States

American federalism was originally designed as a dual, or as Wheare put it, coordinate, system of government with the two levels of government operating independently in their respective spheres of responsibility.¹⁹ After years of gradually moving in a more cooperative direction, it was transformed after 1933 when congressional regulation began to dominate intergovernmental relations under the impact of New Deal legislation and economic modernization.²⁰

It was the experience of the Great Depression that established the New Deal as a regime of intergovernmental cooperation under the aegis of Congress. By the end of the Second World War, and notwithstanding the question of civil rights, the United States had evolved into a homogeneous national state, and intergovernmental relations almost entirely became subservient to the proliferation of national programs emanating from Washington.

From then on, the fundamentals of the constitutional settlement were no longer in dispute, even though its interpretation was almost continually contested before the courts. Consequently, intergovernmental relations developed pragmatically into a giant machinery of program delivery. At the core were the categorical grants-in-aid discussed in Chapter 7—conditional financing programs offered to states and local governments for specific policy purposes deemed to be in the national interest. From the mid-1960s onwards, Congress added to this by greatly increasing its use of “preemption statutes”—laws that used the constitution’s “supremacy clause” to pre-empt or take over policy areas from the states or impose requirements on them.²¹ American intergovernmental relations, then, took on a top-heavy regulatory and at times even outright

18 Jennifer Wallner, “Empirical Evidence and Pragmatic Explanations: Canada’s Contributions to Comparative Federalism,” in Linda A. White, Richard Simeon, Robert Vipond, and Jennifer Wallner (eds.), *The Comparative Turn in Canadian Political Science* (Vancouver: UBC Press, 2008), 171.

19 K.C. Wheare, *Federal Government*, 4th ed. (Oxford: Oxford University Press, 1963), 2.

20 As first identified by Jane Perry Clark, *The Rise of a New Federalism: Federal–State Cooperation in the United States* (New York: Columbia University Press, 1938); also see Harry N. Scheiber, “Federalism and Legal Process: Historical and Contemporary Analysis of the American System,” *Law and Society Review* 14.3 (1980): 663–722.

21 Joseph E. Zimmerman, *Congressional Preemption: Regulatory Federalism* (Albany: State University of New York Press, 2005), 7.

coercive character,²² despite much talk about a new and more deregulatory as well as collaborative federalism. Toward the end of the century, there was even talk about a “devolution revolution,” but that in the end represented a modest change.²³ Indeed, centralization continued apace, with concerns about global competitiveness driving a dramatic escalation of the federal government’s role in education through *No Child Left Behind* regulation, and terrorism driving a dramatic escalation in the federal government’s role in policing and security. The latter has included “the emergence of local fire departments—one of the last bastions of purely localized services—as a critical front line in the national homeland security initiative.”²⁴

The Intergovernmental Maze

The United States is neither the largest nor the most populous country in the world, but it surely must have the most complex and interdependent system of government. In fact, there are more than 90,000 governments operating within its boundaries: 1 national; 50 state; and the rest local, including 3,000 counties, 19,000 municipalities, 17,000 townships, 13,000 school districts, and 37,000 special districts for particular purposes such as regional water management or metropolitan transportation and transit.²⁵

Intergovernmental relations in this maze of governments have always centred on financial aid—especially, as we saw in Chapter 7, since 1913 when Congress gained the power to impose a national income tax that gave it superior access to revenue. In fact, when Americans talk about intergovernmental relations, they have most in mind the vast array of grants-in-aid on which state and local governments increasingly have become dependent.

As in all federal systems, cash transfers initially played a modest role in American governance. They began to grow rapidly in numbers and dollar amounts during the twentieth century when Congress assumed supremacy over

22 See John Kincaid, “From Cooperative to Coercive Federalism,” *Annals of the American Academy of Political and Social Science* 509.1 (1990): 139–52.

23 See Chung-Lae Cho and Deil S. Wright, “The Devolution Revolution in Intergovernmental Relations in the 1990s: Changes in Cooperative and Coercive State–National Relations as Perceived by State Administrators,” *Journal of Public Administration Research and Theory* 14.4 (2004): 447–68.

24 Timothy J. Conlan and Paul L. Posner, “Introduction: Intergovernmental Management and the Challenges Ahead,” in *Intergovernmental Management for the Twenty-First Century* (Washington, DC: Brookings Institution Press, 2008), 3.

25 Laurence J. O’Toole and Robert K. Christensen, “American Intergovernmental Relations: An Overview,” in Laurence J. O’Toole and Robert K. Christensen (eds.), *American Intergovernmental Relations: Foundations, Perspectives, and Issues*, 5th ed. (Thousand Oaks, CA: CQ Press, 2013), 3–4.

such policy fields as welfare, health, and highway construction. But it was not until the 1960s that they began to overshadow the entire system of governance. In 1964, there were 51 such programs amounting to \$10 billion. Ten years later, there were 550 programs costing \$43 billion. After 1980, the Reagan presidency proclaimed a new federalism based on deregulation and budget-cutting. The result was a consolidation into approximately 400 grants programs to the tune of \$100 billion, which amounted to a 13-per-cent cut in federal transfers.²⁶

It was only a modest achievement, and American intergovernmental relations remained caught in a web of regulatory federal control. To the extent that there was change, it was not so much occasioned by a commitment to a more balanced federalism in which the states would become more significant intergovernmental partners as it was driven by a neo-conservative agenda of reduced public spending and the downloading of fiscal responsibilities to lower levels of government. As one observer noted at the time, the ultimate purpose of this new "new federalism" was to abandon the earlier and more liberal notion that the federal government was responsible for nationally equitable standards of public services for all citizens.²⁷ Without the necessary financial commitment in the form of grant money, the continuing regulation of whatever Congress considered to be in the national interest put additional political and administrative strains on state and local governments.

The picture did not change much when the Republican Congress of 1994 proclaimed what was trumpeted as the "devolution revolution." The main thrust of the devolution revolution was, likewise, not so much real power decentralization as it was an attack on national deficit spending and the redistributive nature of welfare spending in general. However, signed into law by Democratic president Bill Clinton and accompanied by both spending cuts and the usual slew of regulatory impositions, the *Personal Responsibility and Work Opportunity Reconciliation Act* of 1996 did effectively hand the responsibility for welfare back to the states.²⁸

American intergovernmental relations focus primarily on specific program delivery and not on fundamental issues concerning the constitutional division of powers. Their proliferation since the 1960s had a lot to do with a new federal focus on local government that deliberately bypassed state authorities. Its regulatory nature can be explained by congressional supremacy or presidential ambition only in part. Other explanations point to the ideology of checks and balances that

26 O'Toole and Christensen, "American Intergovernmental Relations," 7-14.

27 George E. Peterson, "Federalism and the States: An Experiment in Decentralization," in John L. Palmer and Isabel V. Sawhill (eds.), *The Reagan Record: An Assessment of America's Changing Domestic Priorities* (Cambridge, MA: Ballinger, 1984), 259.

28 Timothy Conlan, *From New Federalism to Devolution: Twenty-Five Years of Intergovernmental Reform* (Washington, DC: Brookings Institution Press, 1998).

sees one government as a legitimate constraint upon another. In comparison to other federations such as Canada or Australia, the wisdom of the constitutional division of powers itself is seldom questioned. Intergovernmental relations therefore are more centred on policy than politics. National policy regulation does not immediately become a fundamental issue of power encroachment.

The Intergovernmental Lobby

When Americans talk about intergovernmental relations, they usually have in mind the administrative dimension of fiscal federalism: the myriad meetings among government officials and policy specialists trying to sort out and make the best possible use of the grant system. What is missing is intergovernmentalism from the input side, the participation of the lower levels of government in national policy formation. American federalism does not accord to the state or local governments a place at the federal bargaining table.

Instead, state and local governments have to rely on lobbying like everyone else. Indeed, discussion of the representation of state interests in Washington is often treated as simply a subset of "interest group politics."²⁹ Coinciding with the expansion of the grant system, a so-called intergovernmental lobby established itself permanently in Washington. The five largest lobby groups are the National Governors' Association, the National Conference of State Legislatures, the National League of Cities, the US Conference of Mayors, and the National Association of Counties. These organizations have permanent offices in Washington, employing over 400 people, and spending some \$45 million annually—all with the overriding purpose of influencing congressional grant legislation in their favour. Not only must the states accept the same outsider status as any other interest group in Washington, but they do not even have any coherent representation. Since the state governments are also structured on the separation of powers principle, they are each internally divided, further reducing any capacity for horizontal IGR and coordinated representation.

The role of the states in the intergovernmental system is further weakened by the functionally disjointed practice of congressional policy-making. Specific funding programs are the result of bargaining within and across a plethora of special congressional subcommittees, and the process of lobbying is left in the hands of policy specialists. A general position toward the states is often not discernible.

29 As in Beverly A. Cigler, "Not Just Another Special Interest: The Intergovernmental Lobby Revisited," in Allan J. Cigler and Burdett A. Loomis (eds.), *Interest Group Politics*, 8th ed. (Washington, DC: CQ Press, 2012). See also Anne Marie Cammisia, *Governments as Interest Groups: Intergovernmental Lobbying and the Federal System* (Westport, CT: Praeger, 1995).

30 Bolleyer, *Intergovernmental Cooperation*, 68—though horizontal relations are an important, and constitutionally recognized, element of American federalism; see Joseph F. Zimmerman, *Horizontal Federalism: Interstate Relations* (Albany: State University of New York Press, 2011).

Waivers: Executive Federalism through the Back Door?

Despite the pervasive image of American federalism as “cooperative,” politically, American intergovernmental relations have essentially remained in the original dual mould. In comparison to most other federations, there is “very little formal cooperation.” The bicameral Congress is still seen as the exclusive provider of shared rule: “With the direct election of US senators, there is no need for federal legislators to listen or cater to the needs of state legislators.”³¹ Congressional politics, with its piecemeal approach to policy-making driven by special interest groups, caucuses, and committees is simply not concerned with the impact of national legislation on subnational rights, concerns, or needs.

Below the level of high politics, though, American federalism involves a chronic requirement for cooperation. Environmental regulation, for instance, involves both levels of government in a complex and dynamic relationship.³² Most broad Congressional acts contain provisions for flexible implementation and administration in recognition of the possibilities for diversity and experimentation across the 50 states.³³ This in turn allows federal administrations to issue so-called **waivers** whereby applicant states, localities, and other organizations such as school districts or labour unions can be exempted from some or all of the compliance requirements of an Act when these are deemed too rigid. Waivers have been used most extensively in the health policy field, providing considerable scope for experimentation with different program design across the states.³⁴ Recent administrations have also used waivers more generally as a political weapon bypassing congressional opposition or gridlock in order to promote their agendas.

President Clinton, for example, used waivers to expand health-care coverage after his national health-care proposal was defeated. President Obama has granted waivers to several states when Congress would not act on untenable compliance

31 John Dinan, “United States of America,” in Katy Le Roy and Cheryl Saunders (eds.), *Legislative, Executive, and Judicial Governance in Federal Countries* (Montreal: McGill-Queen’s University Press, 2006), 333–34.

32 William W. Buzbee, “Federal Floors, Ceilings, and the Benefits of Federalism’s Institutional Diversity,” in William W. Buzbee (ed.), *Preemption Choice: The Theory, Law, and Reality of Federalism’s Core Question* (New York: Cambridge University Press, 2009), 98–115; Ann E. Carlson, “California Motor Vehicle Standards and Federalism: Lessons for the European Union,” in David Vogel and Johan F.M. Swinnen (eds.), *Transatlantic Regulatory Cooperation: The Shifting Roles of the EU, the US and California* (Cheltenham, UK: Edward Elgar, 2011), 49–80.

33 Buzbee (ed.), *Preemption Choice*.

34 Carol S. Weissert and William G. Weissert, “Medicaid Waivers: License to Shape the Future of Fiscal Federalism,” in Timothy J. Conlan and Paul L. Posner (eds.), *Intergovernmental Management for the Twenty-First Century* (Washington, DC: Brookings Institution Press, 2008), 157–75. Also see David J. Barron and Todd D. Rakoff, “In Defense of Big Waiver,” *Columbia Law Review* 113.2 (2013): 265–345.

requirements under the *No Child Left Behind Act* (e.g., standardized test scores, teacher qualifications). Such waivers are “produced by bargaining between federal and state executive branch officials” and in this way can be interpreted as tools of a “new executive federalism,” direct policy-making interactions between the national and subnational levels of government.³⁵ They are regulatory tools based on executive order, however, and as such they do not change the overall picture of American intergovernmental relations as one in which intergovernmental collaboration in policy-making is largely absent.

Executive Federalism in Canada

In his 2007 Throne Speech, the newly elected Conservative prime minister of Canada, Stephen Harper, expressed his preference for the classical form of dual federalism by proclaiming that his government would respect “the constitutional jurisdiction of each order of government.”³⁶ The Harper government specified further that it would “introduce legislation to limit the federal spending power in areas of exclusive provincial jurisdiction.”³⁷ Far more than just a nod to Harper’s Western electoral base with its distaste for central Canadian meddling, these pronouncements were nothing less than a wholesale repudiation of the way in which Canadian federalism had functioned during the previous half century of modernization and welfare-state building.

The Rise of Executive Federalism

As in other cases, the Canadian founders had not really paid attention to intergovernmental relations. The idea was to create a divided form of federalism characterized by “watertight compartments.” There was to be little negotiation or coordination, and jurisdictional disputes would be referred to the courts (see Chapter 11). In essence, this classical model of federalism endured until the 1950s, when federal initiatives led to the introduction of a series of shared-cost programs in areas under provincial jurisdiction, such as most prominently the 1957 *Hospital Insurance and Diagnostic Services Act*.³⁸

35 David Brian Robertson, “American Federalism as a Political Weapon,” in Raymond L. La Raja (ed.), *New Directions in American Politics* (New York: Routledge, 2013), 35.

36 Cited in Michael Behiels and Robert Talbot, “Stephen Harper and Canadian Federalism: Theory and Practice, 1987–2011,” in Michael Behiels and François Rocher (eds.), *The State in Transition: Challenges for Canadian Federalism* (Ottawa: Invenire, 2011), 55. A Speech from the Throne officially opens every new session of Parliament in Canada.

37 Allan M. Maslove, “Introduction: A More Orderly Federalism?,” in Allan M. Maslove (ed.), *How Ottawa Spends, 2008–2009: A More Orderly Federalism?* (Montreal: McGill-Queen’s University Press, 2008), 9.

38 This and the following is based on Richard Simeon and Ian Robinson, *State, Society, and the Development of Canadian Federalism* (Toronto: University of Toronto Press, 1990), 148–50.

Even though they came with conditional strings attached, these programs met with widespread provincial acceptance. The conditions, usually in the form of an obligation to maintain national program and delivery standards, were looser than the American grants-in-aid. Additional revenue facilitated the expansion of provincial bureaucracies. And while the federal government could boast that it was looking after the well-being of the national population, the provinces were in charge of delivering the services their citizens wanted.

Intergovernmental relations necessitated by these developments by and large remained at the level of consultation and policy coordination. By the 1960s, however, calls became louder for a more political management of intergovernmental relations, including economic, financial, and constitutional matters. Québec first established a separate Ministry of Intergovernmental Affairs in 1961. The federal government followed suit with a Federal-Provincial Relations Office in 1964. By the early 1970s, such ministries of intergovernmental relations existed in most, if not all, provinces. Canadian executive federalism had become decidedly politicized.

Why did this happen? In all federal systems, the executives of different governments are engaged in necessary tasks of negotiating intergovernmental policy coordination. In most federations, the relationship is somewhat lopsided, though, because the national government ultimately calls the shots due to a variety of factors, including the original constitutional power allocation, its centralist interpretation by the courts over time, superior fiscal capacity, and, more generally, a united national citizenry. The difference in Canada—apart from early judicial interpretation in the opposite direction (see Chapter 11)—is not only that national unity is more fragile than in the other classical federations but also that provincial governments aided by their “jurisdiction over increasingly valuable resources” aggressively engaged in political and administrative “province building.”

According to one view, the deficient construction of the Canadian Senate discussed in the previous chapter helps explain the vigorous nature of executive federalism in Canada. Because the provinces had no legitimate second-chamber voice in national legislation, they had to defend their interests through intergovernmental muscle-flexing. This is the long-standing argument about **intrastate vs. interstate federalism** in Canada.³⁹ It is a logically convincing explanation only in part:

39 See Edwin R. Black and Alan C. Cairns, “A Different Perspective on Canadian Federalism,” *Canadian Public Administration* 9.1 (1965): 27–44; cf. R.A. Young, Philippe Faucher, and André Blais, “The Concept of Province-Building: A Critique,” *Canadian Journal of Political Science* 17.4 (1984): 783–818.

40 See Donald V. Smiley and Ronald L. Watts, *Intrastate Federalism in Canada* (Toronto: University of Toronto Press 1985), 4; also, more recently, Jörg Broschek, “Federalism and Political Change: Canada and Germany in Historical-Institutionalist Perspective,” *Canadian Journal of Political Science* 43.1 (2010): 4.

it overlooks the very limited capacity of most second chambers to provide meaningful “intrastate” representation of subnational government interests. Even a directly elected Senate with equal powers would not have saved Canadian federalism from serious “interstate” competition and conflict.

Cultural asymmetry is usually cited as the most serious reason for this conflict. As a permanent minority, francophone Québec had never quite accepted the constitutional settlement as fair and binding. Transforming itself into a powerful provincial state during the so-called Quiet Revolution in the 1960s, it was Québec that first demanded constitutional change reflecting the new reality. Such change could be brought about only by intergovernmental agreement, because Canada at the time did not have its own constitutional amending formula (see Chapter 10). Against the rising tide of Québec separatism, intergovernmental summity went into overdrive. Because of deeply competing visions, however, the constitutional accommodation of Québec ultimately failed.

All this captures a good part of the picture, but it neglects the role of other provinces, notably oil-rich Alberta in the West, with its own Ministry of Federal and Intergovernmental Affairs. It also tells only half of the story with regard to Québec, where separatism combined with social democracy and standards of public social policy that surpassed the rest of the country. Intergovernmental initiative for a beefed-up national health insurance scheme therefore came from a federal government that for electoral purposes, in Québec as elsewhere, wanted “to stake its claim as the sole guarantor” of social policy entitlements for all Canadians.⁴¹

Federal-Provincial Diplomacy

Because of the political strength of the provinces, intergovernmental relations in Canada developed into what has been classically described as **federal-provincial diplomacy**.⁴² At stake no longer were just issues of policy coordination, or the establishment of specific shared-cost programs, but much more fundamental questions about rebalancing the federation.

In order to understand what is meant by diplomacy in the context of intergovernmental relations, we need to bear in mind the distinction between the *organization* of power in modern states and the *exercise* of power in international relations. Within nation-states, there is one ultimate source of authority: the sovereignty of the people exercised on their behalf by elected representatives. In

41 Gerard W. Boychuk, *National Health Insurance in the United States and Canada: Race, Territory, and the Roots of Difference* (Washington, DC: Georgetown University Press, 2008), 187; Daniel Béland and André Lecours, *Nationalism and Social Policy: The Politics of Territorial Solidarity* (Oxford: Oxford University Press, 2008), 202–3.

42 Richard Simeon, *Federal-Provincial Diplomacy: The Making of Recent Policy in Canada* (Toronto: University of Toronto Press, 1972).

federal systems, this authority is constitutionally divided between two or more levels of government acting on behalf of different aggregations of the popular will. Jurisdictional conflicts are typically resolved by supreme courts. In international relations, there is no such ultimate authority. All states are equally sovereign, and, at least in principle, differences and conflicts can be resolved peacefully only by mutual agreement or voluntary submission to various mechanisms of conflict resolution.

This is the essence of diplomacy. In the Canadian case, intergovernmental relations can be called “quasi-diplomatic” because, on the one hand, there is a constitution that allocates powers to different levels of government and a supreme court watching over the exercise of these powers within legitimate constitutional limits. Yet, on the other hand, the federal system routinely came to rely on intergovernmental agreement as if the provinces were sovereign entities alongside the national government. Intergovernmentalism thus became a political game played out among Canada’s first ministers.

It was Québec’s premier Jean Lesage who in 1960 not only proposed to hold **First Ministers’ Conferences** (FMCs) as annual events but also initiated the practice of annual **Premiers’ Conferences**, which he thought were “necessary and urgent” for the provinces to reach agreement on “the large number of questions that divide them among themselves and from the federal government.”⁴³

First Ministers’ Conferences

FMCs had been convened on occasion throughout Canadian history and for a variety of reasons. But it was constitutional reform and “patriation”—agreement on a domestic constitutional amendment formula—that became the defining issues for a dramatic shift toward competition and conflict in Canadian intergovernmentalism. As Québec had thwarted all earlier attempts to reach a unanimous constitutional settlement, push came to shove when Liberal prime minister Pierre Trudeau threatened unilateral action (see Chapter 10).

A new type of “summit federalism” began to take shape, with all the paraphernalia of international conferences: flags, government limousines, rolling cameras, and press conferences after lengthy and often night-long meetings behind closed doors. Yet all the orchestrated hype could not prevent the eventual constitutional settlement of 1982 being concluded without Québec. After Trudeau’s departure in 1984, a new and more reconciliatory Conservative prime minister, Brian Mulroney, tried twice to bring Québec into the constitutional fold, and twice he actually managed to reach unanimous intergovernmental agreement. Yet both agreements failed during the ratification phase—by provincial legislatures in the case of the 1987 Meech Lake Accord, and by the people in a referendum following the 1992 Charlottetown Accord.

43 As cited in Simeon and Robinson, *State, Society*, 202.

It was this constitutional crisis that lastingly discredited executive federalism, both in the public eye and among scholars of federalism who argued that executive deals behind closed doors suffered from an unacceptable democratic deficit.⁴⁴ It could be argued, however, that the bone of contention was not so much a lack of democracy as it was a lack of success, as Canadians seemed quite happy with executive federalism as long as it delivered the public services they wanted. The extraordinary spectacle of intergovernmental constitutionalism would then in hindsight appear as but a deviation from the normalcy of intergovernmental relations in Canada.

The practice of FMCs peaked during the same period that saw the constitutional showdown between the federal government and the provinces. While there had been 19 FMCs between 1900 and 1959, the number rose to 39 between 1959 and 1984. In 1985 alone there were 13 FMCs—although some of these involved only the prime minister and one or several premiers. The number of intergovernmental agreements “increased exponentially” as well: in addition to major fiscal transfers (see Chapter 7), there were 99 cost-sharing agreements, 50 intergovernmental transfer agreements, 93 joint activities, and over 60 other arrangements.⁴⁵

Summit federalism declined during the 1990s, when FMCs were downgraded to more informal FMMs (First Ministers’ Meetings).⁴⁶ The period to date has only seen a few major new agreements. One was the 1999 *Social Union Framework Agreement* (SUFA), in which the federal government promised provincial consultation prior to major federal funding changes to existing federal–provincial programs or new joint program initiatives. The agreement also contained a general commitment of all governments to collaboration, transparency, information sharing, and dispute avoidance. Québec participated in the negotiations but did not sign the agreement in the end. Other governments “seem less and less committed to its promises.”⁴⁷ For the time being, SUFA

44 See Julie Simmons, “Democratizing Executive Federalism: The Role of Non-Governmental Actors in Intergovernmental Agreements,” in Herman Bakvis and Grace Skogstad (eds.), *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, 3rd ed. (Don Mills, ON: Oxford University Press, 2012), 322.

45 Kathy Brock, “Executive Federalism: Beggar Thy Neighbour?,” in François Rocher and Miriam Smith (eds.), *New Trends in Canadian Federalism*, 2nd ed. (Toronto: University of Toronto Press, 2003), 73.

46 Martin Papillon and Richard Simeon, “The Weakest Link? First Ministers’ Conferences in Canadian Intergovernmental Relations,” in J. Peter Meekison, Hamish Telford, and Harvey Lazar (eds.), *Canada: The State of the Federation 2002—Reconsidering the Institutions of Canadian Federalism* (Montreal: McGill–Queen’s University Press, 2004), 114.

47 Gerald Baier, “The Courts, the Constitution, and Dispute Resolution,” in Herman Bakvis and Grace Skogstad (eds.), *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, 3rd ed. (Don Mills, ON: Oxford University Press, 2012), 90.

remains an important expression of Canadian collaborative federalism more in principle than in substance.

Another agreement was the 2005 so-called Kelowna Accord, an ambitious plan to improve the deplorable living conditions of Canada's Aboriginal Peoples. Negotiated over 18 months among first ministers and Aboriginal leaders, it was scrapped when the minority government of Liberal prime minister Paul Martin fell shortly afterwards and Stephen Harper became prime minister. Since then, and in line with his pledge of returning to a classical form of dual federalism, Harper has convened only two FMMs—both occasioned by the global economic crisis in 2008.

Premiers' Conferences

Québec's call to interprovincial arms in 1960 was initially met with some reluctance. Ontario in particular still saw its central Canadian interests well represented by the federal government and did not want to see premiers' meetings as "ganging up" on Ottawa.⁴⁸ Parallel to the establishment of the Annual Premiers' Conference, however, the decade saw a rather more belligerent rise in regional interprovincial activity, with the Council of Maritime Premiers being formed in 1972 and the Western Premiers' Conference in 1973.

This rise in regional interprovincial activity reflected the fragmented nature of the Canadian federation. In east and west, the federal government had long been seen as dominated by central financial and manufacturing interests. The increasingly singular focus of federal politics on the containment of Québec separatism became another grievance. While the fiscally transfer-dependent Atlantic provinces had few means to take on the federal government directly, the resource-rich West, led by Alberta, became a powerful player in what essentially turned into a triangular interest competition with Ottawa and Québec.

The protracted constitutional crisis of the 1980s reflected all these regional concerns and grievances. By the time it was over and the threat of Québec separatism appeared to subside after the 1995 referendum, the focus of intergovernmental relations had already shifted back to social policy. Combatting a sluggish economy and a huge budget deficit, the federal government administered drastic cuts in transfer payments.

Searching for a common response, and at the suggestion of the Liberal—and therefore pro-federalist—premier of Québec, Jean Charest, the 13 premiers of the provinces and territories unanimously agreed in 2003 to transform the Annual Premiers' Conference into a **Council of the Federation**. Meetings were to be held twice a year and supported by a permanent secretariat. The

⁴⁸ Simeon and Robinson, *State, Society*, 203.

newfound unity for the purpose of providing an “integrated and coordinated approach to federal–provincial relations”⁴⁹ was successfully put to the test at the FMM on the future of health care a year later. Confronted by a united front of premiers and aided by an improving economy, the new Liberal prime minister Paul Martin, who as finance minister had administered the cuts, not only restored most of the funding but committed to a 10-year plan of stable funding under the 2004 Health Care Accord. The ongoing operation of the Council of the Federation shows that horizontal IGR has a meaningful presence in Canadian federalism.

A More Confederal Canada?

So it would seem that the big picture of Canadian intergovernmental relations is moving from a predominantly vertical to a more significantly horizontal dimension. Some even speak of a more “confederal” Canada in which interprovincial self-coordination in areas under provincial jurisdiction might take the place of federal–provincial diplomacy.⁵⁰ Yet the cozy picture of interprovincial cooperative unity is disturbed by the parallel emergence of a “beggar-thy-neighbour” federalism: provincial premiers breaking ranks with their colleagues by striking bilateral deals with the federal government when this is to their advantage.⁵¹

From a federal government perspective, the picture looks more like “divide and rule” federalism—which squares poorly with the classical form of dual federalism. Since Prime Minister Stephen Harper came to power in 2006 no new deals have been struck. Apart from the aforementioned crisis meetings on the economy in 2008–09, Harper has not convened a single FMM, and he has repeatedly rebuffed the premiers by turning down invitations to attend Council of the Federation meetings. As of April 2014, the Canada Health Accord last renegotiated in 2004 has lapsed.

Classical or dual federalism in Harper’s understanding does not exclude unilateral action when this suits his political agenda, however. Thus, in defiance of the SUFA agreements of 1999, the federal government unilaterally changed the funding formula under the iconic 1984 *Canada Health Act*, and it introduced legislation for a national securities regulator to supersede provincial regulators in the aftermath of the 2008 financial and economic crisis. Invalidating this legislation in its 2011 *Securities* decision, it fell to the Supreme Court of Canada to remind the governments of Canada that intergovernmental collaboration would serve Canadians best (see Chapter 11).

49 As cited from the founding agreement in Simeon and Nugent, “Parliamentary Canada,” 66.

50 Simeon and Nugent, “Parliamentary Canada,” 67.

51 Brock, “Executive Federalism,” 78.

Interlocking Federalism in Germany

Informality is not what comes to mind first when thinking about German federalism. If Canada is a case of “negotiated constitutionalism,” as it has been suggested, then Germany is one of “regulatory constitutionalism.”⁵² Nevertheless, bureaucrats and politicians play an intense intergovernmental role in the German federal system.

Yet intergovernmental relations in Germany differ significantly from the cases discussed so far. In the American case, the divided legislative process allows not much more than intergovernmental cooperation at the administrative end of policy implementation and administration. Given the limited possibilities of influencing federal legislation, horizontal interstate cooperation remains weak as a means of defending collective state interests. In Canada, as we just saw, and despite the fact that it likewise is a case of divided legislative federalism, important policy areas require cooperation and joint decision-making via intergovernmental agreement, and this requirement in turn has strengthened the horizontal dimension of interprovincial cooperation.

In the German case of integrated federalism, legislative joint decision-making is directly built into the system via the *Bundesrat* (see Chapter 6). It is also required constitutionally for the so-called joint tasks (see Chapters 6 and 10). And the system of administrative federalism whereby the execution of federal legislation is entirely left to the *Länder* brings with it a need for extensive self-coordination at the *Länder* level.

The result has been called a “labyrinthine structure of joint standing conferences, committees and working groups.”⁵³ Because this structure has increasingly been seen as inefficient and lacking legitimacy, efforts have been made by the premiers of the *Länder* in recent years to cut down on the number of committees and working groups and thus to reduce the dominant influence of “technocrats” and policy specialists.⁵⁴ The German intergovernmental machinery nevertheless is probably still the most intertwined or, as the German jargon goes, **interlocked**, of all major federations.

The Quest for Policy Harmonization

There are several explanations for this interlocked nature of German intergovernmental relations.⁵⁵ Since the *Länder* are in charge of policy implementation

52 Arthur Benz, *German Dogmatism and Canadian Pragmatism? Stability and Constitutional Change in Federal Systems* (Hagen: Institut für Politikwissenschaft, FernUniversität Hagen, 2008), 31.

53 Stefan Oeter, “Federal Republic of Germany,” in Katy Le Roy and Cheryl Saunders (eds.), *Legislative, Executive, and Judicial Governance in Federal Countries* (Montreal: McGill-Queen’s University Press, 2006), 156.

54 Arthur Benz, *Intergovernmental Relations in German Federalism: Joint Decision-Making and the Dynamics of Horizontal Cooperation* (Hagen: FernUniversität Hagen, 2010). ♦

55 This and much of the following section is based on Benz, *Intergovernmental Relations*.

and administration, the federal government needs their expertise at the stage of policy formulation. By the same token, most federal legislation is general in the sense that it leaves considerable room for policy design and execution at the *Länder* level, and there is also no federal administrative bureaucracy that would perform a coordinative task of policy harmonization across *Länder* boundaries through vertical channels of intergovernmental cooperation, as we have seen in the American and Canadian cases. Thus the *Länder* themselves have to organize this harmonization through horizontal self-coordination.

The quest for policy harmonization in turn is embedded in German political culture. Germany is largely a case of territorial federalism, and while Germans strongly believe in the federalized structure of their political system, they nevertheless want uniform public services. The Basic Law gives expression to this by compelling all governments to cooperate toward equitable living conditions for all Germans while stipulating at the same time that they have to do so by respecting the federal nature of the political system. Major cooperative endeavours such as tax sharing, fiscal equalization, and more recently the joint tasks are not left to intergovernmental agreement but are instead enshrined in national or even constitutional law. In a largely homogeneous society, there has been little room for the proposition noted in Chapter 2 that federalism should permit the subnational units to act as laboratories for social experimentation. Hence even in policy fields where the *Länder* have exclusive jurisdiction—notably education and culture—coordination has been paramount.⁵⁶

A final reason for the interlocked nature of German intergovernmental relations is the party system. On the one hand, it is a highly centralized national party system, which means that the process of intergovernmental negotiation and coordination is to a large extent driven by party politics across jurisdictional boundaries. On the other hand, due to a proportional electoral system, German governments at both levels are almost without exception coalition governments. This means that both the approval of federal legislation in the *Bundesrat* and policy coordination at the *Länder* level require intense negotiation in order to find agreement across partisan lines.

Vertical Cooperation

Germany is the only formalized case of strong intrastate federalism among classical federations. Even after the 2006 constitutional reforms, the *Länder* governments still co-determine about 40 to 50 per cent of all federal legislation

⁵⁶ With, of course, exceptions; see Franz Gress, "Federalism and Democracy in the Federal Republic of Germany," in Michael Burgess and Alain-G. Gagnon (eds.), *Federal Democracies* (Abingdon, UK: Routledge, 2010), 178–201; Susanna Blanke, *Politikinnovationen im Schatten des Bundes: Policy-Innovationen und -Diffusionen in Föderalismus und die Arbeitsmarktpolitik der Bundesländer* (Wiesbaden: Verlag für Sozialwissenschaften, 2004).

via the *Bundesrat* (see Chapter 8). The German second chamber's construction as a council must not be confused with intergovernmental relations or executive federalism, however. The *Länder* delegates in the *Bundesrat* act as legislators and interact with the elected members of the parliamentary first chamber, the *Bundestag*.

This does not mean that the German federal system is lacking vertical cooperation between the executives of both levels of government. And since little is left to chance in Germany's system of "regulatory constitutionalism," vertical cooperation between the federal chancellor (*Bundeskanzler*) and the premiers (*Ministerpräsidenten*) of the *Länder* is regulated as well. Article 65 of the Basic Law determines that the "Federal Chancellor shall conduct the proceedings of the Federal Government with rules of procedure adopted by the Government and approved by the Federal President."⁵⁷ First adopted in 1951, these rules of procedure stipulate in paragraph 31 that the chancellor shall invite the *Ministerpräsidenten* (premiers) "personally and several times a year" in order to discuss "important political, economic, social and financial questions" as well as to work toward a "uniformly shared understanding of politics" at both levels of government.

As it turns out, West Germany's first chancellor, Konrad Adenauer, largely ignored this regulatory obligation. He rarely invited the premiers, and when he did, he summoned only those belonging to his own conservative party in order to strategize against the opposition. Only once the Social Democrats first formed the federal government in the late 1960s did these meetings of Germany's first ministers become regularized and inclusive. Even though they are no more than consultative in nature, they are now carefully planned and prepared by senior staff.⁵⁸ On occasion they can also result in a more substantive outcome. This was the case in 1993, for instance, when agreement was first reached on the so-called solidarity pact—joint transfer payments to the new and poorer eastern German *Länder*—before it was then formally approved by a legislative compromise between the governing conservatives and the Social Democratic opposition holding the majority of votes in the *Bundesrat*.

Apart from this first ministers' summitry, intergovernmental relations in Germany are also regularized at the ministerial level. Since the late 1960s there has been a Council for Fiscal Planning (*Finanzplanungsrat*) and a Council for Economic Development (*Konjunkturrat*) coordinating budgetary planning and public borrowing. As part of a 2009 constitutional fiscal reform package (see Chapter 7), a Council for Stability (*Stabilitätsrat*) was established in 2010.

⁵⁷ The German federal president is the formal head of state with mainly ceremonial duties, as compared to the federal chancellor as the head of government.

⁵⁸ Heinz Laufer and Ursula Münch, *Das föderative System der Bundesrepublik Deutschland*² (Opladen: Leske + Budrich, 1998), 258.

Replacing the Council for Fiscal Planning, it operates as a cooperative early warning system for budgetary emergencies (see Chapter 7).

Länder Cooperation in Federal Legislation

Much more important for the functioning of the federal system are the negotiations that accompany specific legislative initiatives requiring bicameral approval. This is where the “technocrats” come into play. The relevant departments at both levels of government scrutinize a proposed bill for compatibility with principles and practices of *Länder* administration. Once a bill is before the *Bundesrat*, a “two-level process” kicks in: the committees of the *Bundesrat* as well as the *Länder* ministries and cabinets try to negotiate a common position.⁵⁹ This is where party politics comes into play. Committee work in the *Bundesrat* is prepared by separate working groups that parallel the government–opposition divide in the *Bundestag*. But because the *Länder* are increasingly governed by party coalitions cutting across this divide, and because these governments tend to abstain from voting and abstentions are counted as negative votes, the approval of bills has become more difficult as it requires a *de facto* absolute majority of votes cast.

Joint Tasks

As we saw in the Canadian case, modernization pressures led to joint decision-making based on intergovernmental agreement or contracting. True to form, the Germans went a step further by constitutionally enshrining joint decision-making in areas under *Länder* jurisdiction deemed to require federal financial support: regional development, agriculture, and, until the 2006 reforms, post-secondary education. In essence, these joint tasks are about intergovernmental planning and shared-cost financing. As such, they constitute a unique form of intergovernmentalism. Other than in the case of conventional intergovernmental agreements, which require unanimity, joint decision-making in these policy fields falls to planning committees endowed with a qualified majority rule procedure by which the national government has as many votes as the *Länder* taken together. Unanimity prevails in most instances, however, because the *Länder* governments have a collective interest in benefiting from federal grant money.

Still, the united front has shown cracks in recent years. While richer *Länder* have financed projects such as university construction on their own when the joint framework plans did not accord them priority, poorer *Länder* had to forgo federal money they were entitled to because their own budgetary situation did not allow co-financing. It is not least for this reason that postsecondary education was taken off the list of joint tasks in 2006.

The joint tasks have been widely criticized as a form of vertical executive power collusion undermining the autonomy of the *Länder* parliaments in

⁵⁹ This and the following is again based on Benz, *Intergovernmental Relations*.

particular. Moreover, they have famously been characterized as a "joint-decision trap" whereby necessary policy decisions are frustrated by the vested interests of too many participants (see Chapter 12).⁶⁰ From a comparative perspective, however, such criticisms seem overblown. It would be difficult, for instance, to award to the American grants system higher marks for efficiency, or to argue that Canadian executive federalism is more democratic. But it seems clear that it is the "technocrats" in the responsible government departments that are most interested in maintaining joint decision-making. In the two remaining joint tasks, regional development and agriculture, this form of intergovernmental cooperation also facilitates coordination with the European Commission—which controls subsidies under the Structural Funds.

Länder Self-Coordination

The premiers of the reconstituted *Länder* had met regularly even before the West German federal republic was created in 1949. Afterwards these meetings were temporarily suspended as unnecessary, but this quickly was realized as a mistake.⁶¹ When they were resumed in the early 1950s, it was the Bavarian premier, Hans Ehard, who first realized the continued importance of *Länder* self-coordination in the new federal system. It is worth quoting Ehard's opening remarks at a meeting of the premiers in 1954, because they closely echo the concerns of Québec premier Jean Lesage a few years later (see above in this chapter, p. 254). The meetings should deal with questions, Ehard admonished his colleagues, that show a "certain seductiveness" for central usurpation if the *Länder* cannot manage to resolve them "reasonably and intelligently through mutual cooperation."⁶²

Länder premiers and cabinet ministers have met regularly in conferences ever since, and their federal counterparts are sometimes invited to participate. As in the Canadian case, these conferences have no constitutional basis. They are, however, well regulated by formal rules, standing orders or resolutions, and they are well supported by the *Länder* bureaucracies. Only one of these conferences, the Permanent Conference of the Ministers for Cultural and Educational Affairs (*Ständige Kultursministerkonferenz*, KMK) has its own bureaucracy, including a secretariat employing more than 200 civil servants. The KMK is "permanent" in the sense that its work is ongoing by means of some 36 commissions, sub-commissions, and working groups in which the federal government may participate as well.

60 Fritz W. Scharpf, "The Joint-Decision Trap: Lessons from German Federalism and European Integration," *Public Administration* 66.3 (1988): 239–78.

61 Laufer and Münch, *Das föderative System*, 256.

62 Cited in Laufer and Münch, *Das föderative System*, 257.

There is a paradoxical quality to this. Even in one of the few policy fields where they are truly autonomous, the *Länder* go to extraordinary lengths to bring about uniformity. In one way, the explanation is quite simple: the *Länder* respond to citizens' demands. Job mobility for families with children, for instance, requires transferable report cards if not harmonized school curricula. In another way, however, the explanation is more complicated, and the KMK exemplarily illustrates the complex nature of Germany's integrated federalism more generally.⁶³

As the Bavarian premier Ehard realized early on, the German federal system has been constructed with what is indeed a paradoxical or contradictory mandate. Most federal legislation is "framework legislation," in spirit if no longer in name (see Chapter 6). This leaves the *Länder* administrations considerable leeway for policy design and implementation. At the same time, however, there is the constitutional obligation to provide equitable living conditions for all Germans. *Länder* self-coordination for the purpose of policy harmonization developed, therefore, as a pre-emptive strategy against possible federal encroachment in the name of equitability. By all counts, however, the battle against federal encroachment has not been very successful. It is difficult to deny the national government a leading role when the goal is harmonization rather than differentiation.

Ideological differences between the dominant conservative and social democratic parties have always contributed to making the process of self-coordination difficult. After reunification it has become even more complicated, as the old left-right dualism fragmented, with five parties present in the parliaments at both levels of government, and political haggling is more likely to overtake administrative or technocratic cooperation.

Reunification also brought additional regional strains.⁶⁴ As the poorer *Länder* in the east began to coordinate a common position in their quest for fiscal transfers, the premiers of the three richest *Länder* in the west—Bavaria, Baden-Württemberg, and Hesse—responded with what amounts to an informal coalition pressing for fiscal reform and decentralization. Not much has come of it, as the 2009 fiscal reform focused only on public debt management and in particular did not address the issue of fiscal equalization (see Chapter 7). But it seems that a potentially conflictual territorial dimension has been added to German intergovernmental relations.

Council Governance and Comitology in the EU

As we have seen in preceding chapters, the European Union has a mix of federal and confederal characteristics. Inevitably, then, there is an ongoing debate as to whether the EU is best thought of as an "intergovernmental regime" in its entirety, with its institutions designed for the purposes of "negotiated policy

63 Similarly Laufer and Münch, *Das föderative System*, 259.

64 See again Benz, *Intergovernmental Relations*.

coordination”⁶⁵ (confederal), or a genuine case of “supranational governance”⁶⁶ in the sense that it has real autonomous policy-making powers (federal). From our comparative federalism perspective, this dichotomizing debate is somewhat misguided. As is well illustrated by the Canadian case, federalism is more than just a “constitutional arrangement” of allocating “final authority” to different levels of government.⁶⁷ It also includes formal and informal mechanisms of bargaining, contracting, and joint decision-making. Because this procedural dimension of executive federalism at the political level is missing in the dominant American model, the European Union is often overlooked as a form of federalism, and, likewise, federalism has generally fared poorly as a systematic analytical category in the literature on the EU.⁶⁸

As we have seen in the Canadian and German cases, intergovernmental relations generally operate at two levels: agenda-setting executive summit meetings among political leaders, and the ongoing business of intergovernmental policy cooperation at a lower functional level. In the EU, we find both levels of intergovernmentalism again. However, European intergovernmentalism goes well beyond the conventional picture. Government leaders in the European Council decide upon treaty changes equivalent to constitutional amendment and provide general political direction. While having no legislative authority, “if they say that something should happen, it will be acted upon.”⁶⁹ When the independent European Commission does that, by initiating legislative proposals, a dense network of national expert committees known as **comitology** accompanies the process. And when legislative proposals are put before the Council of Ministers for consideration and decision, they are first scrutinized and fine-tuned by **COREPER**, the committee of permanent member-state representatives.

The European Council

The original European Communities were set up in 1958 by intergovernmental agreement analogous to other international treaties. From the very beginning, however, they were different in their ambitious institutional design. Commission,

65 Michelle Cini, “Intergovernmentalism,” in Michelle Cini and Nieves Pérez-Solórzano Borrágán (eds.), *European Union Politics*, 4th ed. (Oxford: Oxford University Press, 2013), 79.

66 Carsten Stroby Jensen, “Neo-Functionalism,” in Michelle Cini and Nieves Pérez-Solórzano Borrágán (eds.), *European Union Politics*, 4th ed. (Oxford: Oxford University Press, 2013), 67.

67 Alberta Sbragia and Francesco Stolfi, “Key Policies,” in Elizabeth Bomberg, John Peterson, and Richard Corbett (eds.), *The European Union: How Does It Work?* 3rd ed. (Oxford: Oxford University Press, 2012), 101.

68 See Thomas O. Hueglin, “Treaty Federalism as a Model of Policy Making: Comparing Canada and the European Union,” *Canadian Public Administration* 56.2 (2013): 186–89.

69 Ian Bache, Stephen George, and Simon Bulmer, *Politics in the European Union*, 3rd ed. (New York: Oxford University Press, 2011), 280.

Council of Ministers, and Parliament were to function much like a federal system, with the Council as the upper chamber in a bicameral decision-making body in which negotiation and cooperation among member states would take place. Further summit meetings of the government leaders were not planned.

However, when French president Charles de Gaulle boycotted Council of Ministers meetings in 1965 because they were about to move from unanimity to qualified majority voting as foreseen by the Treaties, it became clear that there was a need for some sort of intergovernmental summitry. That summitry would provide guidance for the next steps in the integration process and in preparation for far-reaching Council of Ministers decisions. In 1974, informal summit meetings were regularized as European Council meetings with a rotating presidency. The first major treaty revision after Rome, the *Single European Act* of 1987, recognized the European Council and its political importance, and the 1993 Maastricht Treaty codified its composition and number of annual meetings. But it gained official institutional status only with the 2011 Treaty of Lisbon, in obvious recognition of the fact that the European Council had become “politically the most important body in the EU.”⁷⁰

Under the Lisbon Treaty, the European Council must meet at least four times a year. The Council is now chaired by an appointed, full-time president. The only two other regular participants are the president of the Commission and the high representative for foreign and security policy, who is also the vice-president of the Commission. Its main mandate is guidance for general political direction and priorities, but the European Council often acts as a problem-solving body of last resort when the decision-making process stalls in the Council of Ministers.

European Council meetings are characterized by two dynamics. One is owed to the inequality of political weight. Germany and France have traditionally dominated agenda-setting and proceedings, with Britain as a Euroskeptic counterweight diminished by the fact that it has remained outside the Euro-zone. The other dynamic, with a somewhat levelling effect on the weight distribution, has been enlargement. During the 1970s, after the first round of enlargement, European Council meetings still were often not much more than cozy fireside chats among nine leaders. Now, with 28 member states, those meetings have become much more formalized events.⁷¹

Most importantly, the European Council decides upon treaty changes. As we will discuss in Chapter 10, since 1985 major revisions have been preceded by so-called **Intergovernmental Conferences** (IGCs).⁷²

70 Desmond Dinan, *Ever Closer Union: An Introduction to European Integration*, 4th ed. (Boulder, CO: Lynne Rienner, 2010), 206.

71 Dinan, *Ever Closer Union*, 207–10; Bache, George, and Bulmer, *Politics in the European Union*, 276.

72 See Dinan, *Ever Closer Union*, 80–82, 90–95, 151–53.

Commission and Comitology

The European Commission is doubtless the EU's most enigmatic and unloved institution. Those who are reluctant to think about Europe in terms of federalism, associating federalism with the dominant American model, have in mind the image of a centralized super-state controlled by legions of largely unaccountable "Eurocrats" in Brussels. Others—sometimes quite rightly—point to bureaucratic overregulation and fiscal mismanagement. And national politicians like to blame the Commission for "unpopular policies" regardless of whether they "emanate from Brussels or not."⁷³

In reality, the Commission is a rather lean organization by any comparative standard. It controls a minuscule budget that is limited to little over one per cent of the EU's combined GDP. It employs about 25,000 administrators, researchers, interpreters, and translators (for the 23 official languages). Serving a population of less than half, the United States Department of Commerce alone has a staff twice as large. And while the Commission has been guilty of somewhat heavy-handed regulation, most famously regarding the "normal curvature" of bananas,⁷⁴ it has for the most part done exactly what it is expected to do: regulating the flow of goods, services, capital, and people in the world's largest integrated market, as well as overseeing the implementation of key policy objectives under the Treaties such as in agriculture, regional development, and, increasingly, energy and the environment.

At the helm of the Commission are the 28 formally independent commissioners, including the president and vice-president, one from each member state.⁷⁵ Each commissioner, with a small personal staff that now must comprise at least three different nationalities, is responsible for one or more of the so-called Directorates General, some 30 departmental administrative services roughly equivalent to ministries in a national government. The Commission president, who is proposed by the European Council and elected by the European Parliament, selects the remaining commissioners through agreement with the government leaders of each member state. The entire Commission then must be approved by the European Parliament, which can also dismiss it in its entirety through a vote of non-confidence.⁷⁶ Commissioners make all policy decisions collectively regardless of portfolio, either by consent or by majority. In the rare event of a majority decision, all Commissioners must support the decision nevertheless.

The most significant aspect of the Commission in terms of intergovernmental relations is a two-stage committee process preparing legislative initiatives

73 Dinan, *Ever Closer Union*, 172.

74 Commission Regulation (EC) No 2257/94.

75 On this and the following see Elizabeth Bomberg and Alexander Stubb, "The EU's Institutions," in Elizabeth Bomberg, John Peterson, and Richard Corbett (eds.), *The European Union: How Does It Work?* (Oxford: Oxford University Press, 2012), 49–53.

76 This has never happened, but once, in 1999, a Commission resigned collectively when threatened with such a vote.

before they reach the Council for decision-making.⁷⁷ First, approximately 1,200 expert committees—mostly composed of national officials—assist the Commission's permanent staff in working up proposals. Once proposals reach the Commission's more senior political level, they are scrutinized by some 250 policy-specific comitology (implementation) committees. These are set up by the Council of Ministers and composed of national government representatives. The purpose of these committees is twofold: they provide some Council supervision and control over agenda-setting in the Commission; and, as in Germany's system of administrative federalism, they also provide the process of policy formulation with the kind of input by "interadministrative networks" that is necessary, as all policy implementation and administration ultimately falls to the member states.⁷⁸

The European Commission has been a particular focus of the intergovernmentalism versus supranationalism debate. For intergovernmentalists, the Commission is "only an agent of the member states" because its autonomy is limited by the comitology committees—some of which even have effective veto power over Commission decisions. For supranationalists, it is an "autonomous actor" because its exclusive right to initiate legislative proposals does not have to wait for prior member-state instruction, it can put pressure on member states by mobilizing transnational interest networks, and it can directly threaten policy violators with legal action justiciable before the European Court of Justice.⁷⁹

From our perspective, however, Commission and comitology are best understood in federal terms. The formally independent commissioners individually may carry with them to Brussels policy preferences of their respective member states—and particularly so when they are given portfolios that are in the particular interest of their member state. Their collective decisions, however, carry the full weight of autonomous action. Moreover, the Commission's regulatory decisions constitute direct agency, just what the American "Federalists" thought was necessary for efficient governance (see Chapter 4). At the same time, this agency is framed by, and embedded in, intense intergovernmental negotiation and cooperation as a precondition for its acceptance.

The Commission has direct regulatory power; however, its legislative proposals establishing that power under the Treaties are only that—proposals awaiting final decision-making under the "ordinary legislative procedure" by the European Parliament and the Council of Ministers (see Chapter 8). While the Commission functions much as Europe's executive branch of government,

77 See Morten Egeberg, "The European Commission," in Michelle Cini and Nieves Pérez-Solórzano Borragán (eds.), *European Union Politics*, 4th ed. (Oxford: Oxford University Press, 2013), 138–39.

78 See Tanja A. Börzel and Madeleine O. Hosli, "Brussels between Bern and Berlin: Comparative Federalism Meets the European Union," *Governance* 16.2 (2003): 192.

79 See Bache, George, and Bulmer, *Politics in the European Union*, 261–64.

it does not quite fit the picture of parliamentary federalism, where that branch would be under direct parliamentary accountability; nor does it quite align with the model of presidential federalism, where it would be reined in by mutual checks and balances. Such checks and balances are to some extent provided by the intergovernmental comitology, but that operates in largely inscrutable ways. Checks are now more importantly provided under the principle of subsidiarity, the procedural interplay of Council, Parliament, the European Council, and the national parliaments in determining appropriate Union action (see Chapter 6). This has somewhat diminished the scope and dimension of what in earlier years had been widely deplored as unchecked Commission activism.

Council and COREPER

As we saw in the case of the German *Bundesrat*, the construction of a council-type second legislative chamber did not prevent the development of intense intergovernmental activities accompanying the legislative process itself. Similarly in the EU, decision-making in the Council of Ministers is even more reliant on preparatory intergovernmental negotiation and coordination. Not only is there the comitology link to the Commission, but all legislative proposals are scrutinized further by COREPER, the Committee of Permanent Representatives of the Member States.⁸⁰

COREPER is the “preparatory body of the Council,” and as such it is “one of the most intense sites of negotiation in the EU.”⁸¹ The permanent representatives are the member states’ “ambassadors” to the EU. They reside permanently in Brussels, and they often remain in their positions for a much longer time than the ministers they serve and therefore provide continuity, much in the same way in which senior civil servants or department heads provide continuity in the ministries of national governments. Meeting at least once a week in order to prepare the (usually monthly) Council meetings, COREPER is actually split in two: COREPER II is headed by the ambassadors themselves, who prepare Council meetings dealing with sensitive core areas of policy-making such as foreign affairs, finance, and justice; other policy areas are left to COREPER I, which is headed by their deputies.

Although never mentioned in the Treaties, COREPER is an important decision-maker in its own right. Aided by some 170 working groups—yet another network of national policy specialists operating in Brussels—one of its main tasks is to distinguish between two types of issues: so-called A-points on which all

80 The acronym is derived from the French: *Comité des représentants permanents*.

81 Jeffrey Lewis, “The Council of the European Union and the European Council,” in Michelle Cini and Nieves Pérez-Solórzano Borragán (eds.), *European Union Politics*, 4th ed. (Oxford: Oxford University Press, 2013), 147. The following is based on Lewis, 147–49; Bache, George, and Bulmer, *Politics in the European Union*, 283–85; Dinan, *Ever Closer Union*,

member states are in agreement, and B-points, which are deemed controversial. Only B-points are moved up to the Council meetings for further negotiation and agreement. The A-points, which make up more than two-thirds of all matters before the Council, are effectively decided by COREPER and then merely rubber-stamped by the Council without further discussion.

Once again, COREPER underscores the hybrid character of EU governance that cannot be boxed easily into a perspective of either intergovernmentalism or supranational functionalism. On the one hand, the ambassadors in Brussels are their member states' instructed representatives at the helm of a dense network of national policy experts. Every decision they take, and every proposal they send up to the Council for further bargaining, reflects intergovernmental compromise. On the other hand, their permanent presence in Brussels, their personal connections (which include biannual retreats as well as restricted meetings from which even the omnipresent translators and interpreters are excluded) and their common understanding for each other's difficulties in reaching agreement without betraying their governments' positions—all these turn them almost into a secret society, sworn to solidarity and compromise and with its own logic and code of conduct.

One of the jokes in Berlin is that the German government's "permanent representative" (*Ständiger Vertreter*) in Brussels is in reality a "permanent traitor" (*Ständiger Verräter*). While said in jest, it makes clear that these permanent representatives play a much larger and more reciprocal role than do the ambassadors sent to other countries according to diplomatic convention. They most significantly represent their government's position in what is called the Union method of bargaining, but they also convey back to their governments how far national intransigence can go with regard to any particular issue. From a comparative perspective, then, the effectiveness of COREPER puts a damper on demands, as is the case particularly in Canada, that intergovernmental relations should be tolerated as a legitimate part of modern governance in federal systems only if they are conducted under the glaring light of public openness and transparency.

Imitations and Variations

With the exception of the American presidential case, intergovernmental relations are fundamentally alike in all federal systems. There is always a strong reliance on informality and secrecy behind closed doors; there is always a delicate balance between conflict and cooperation; there is increasingly a movement toward genuine collaboration; there is always an effort to increase effectiveness through regularization and the creation of councils, committees, and commissions; and there is always pressure for openness and transparency in order to improve legitimacy. At the same time, there is also always considerable variety, and particularly so because informality leaves more room for political agency. We confine our brief discussion of imitations and variations to two cases almost at opposite ends of the intergovernmental spectrum. In Australia, a particularly

top-heavy form of intergovernmentalism developed as a quest for policy uniformity rather than coordination. In Belgium, where uniformity of any kind is all but impossible, intergovernmental compromise is synonymous with survival.

The Intergovernmental Drive for Uniformity in Australia

A parliamentary system of federalism whereby the pursuit of national executive dominance is not significantly hampered by checks and balances between the executive and legislative branch; a vertical fiscal imbalance well beyond that of other federations (see Chapter 7), leaving the states as subservient clients of Commonwealth largesse; and an expansive judicial interpretation of overriding Commonwealth powers contrary to the original constitutional intention (see Chapter 11)—these factors combined to create what is arguably the most centralized among the world's established federations.⁸²

As a result of the extensive inroads made by the Commonwealth into areas of state jurisdiction, Australian intergovernmental relations have gone the way of ever more intense "cooperation." This is supported by a political culture embedded in "assumptions about the value of national uniformity" that are "cast in terms of the national interest."⁸³ These, in turn, reflect the absence of linguistic or cultural differences between the Australian states,⁸⁴ which moves Australian centralization closer to the German than the American case. But other than in Germany's system of administrative federalism, whereby the *Länder* coordinate policy implementation on the basis of legislation co-determined by them, uniformity in Australia's legislative system of federalism requires cooperation in a divided system of legislation.

Lacking constitutional basis—as in other federations—that cooperation began early on with the so-called premiers' conferences, annual meetings with the prime minister and the Commonwealth treasurer convened by the premiers as a collective forum against Commonwealth expansion in what was still a relatively balanced intergovernmental relationship. Change came during the 1920s, when premiers' conferences began to be convened by the Commonwealth, and the Australian Loan Council (see Chapter 7) set the precedent for intergovernmental council governance by what grew to be a plethora of ministerial councils established over time covering all the main policy areas. The premiers' conferences were formalized as the Council of Australian Governments

82 See Alan Fenna, "The Malaise of Federalism: Comparative Reflections on Commonwealth-State Relations," *Australian Journal of Public Administration* 66.3 (2007): 298–99.

83 Cheryl Saunders, "Cooperative Arrangements in Comparative Perspective," in Gabrielle Appleby, Nicholas Aroney, and Thomas John (eds.), *The Future of Australian Federalism* (Cambridge: Cambridge University Press, 2012), 414.

84 Alan Fenna, "Centralising Dynamics in Australian Federalism," *Australian Journal of Politics and History* 58.4 (2012): 580–90.

(COAG) in 1992: a meeting of the prime minister, the state premiers, the chief ministers of the two self-governing territories, and the president of the Australian Local Government Association. The establishment of COAG and a host of inter-governmental agreements and agencies marked a highpoint of “collaborative federalism” in Australia.⁸⁵ The most interesting of those developments was the creation of a collaborative ancillary institution, the COAG Reform Council (CRC), as the centrepiece of a new comparative performance measurement or “benchmarking” regime.⁸⁶ Until its termination in 2014, the CRC was responsible for assessing the service-delivery performance of each state and territory across a wide range of policy areas where the jurisdictions were in receipt of Commonwealth grants. Under that regime, Australia represented a leading example of the hesitant tendency toward some kind of interjurisdictional performance assessment within federal systems more generally.⁸⁷

From a comparative perspective, Australian “council governance,” with its two-level hierarchy of COAG and ministerial councils, may at first glance appear similar to the European case with its European Council and Council of Ministers. But it is a similarity only in name. European council governance reflects a more confederal federalism. Federalism in the Australian case has moved in the opposite direction. Australian ministerial councils not only have secretariats that are, with few exceptions, located within respective Commonwealth departments, but they must also deliver annual reports to the Prime Minister’s Department “in accordance with a set template.”⁸⁸ And while on the face of it the Council of Australian Governments is an impressive body, “there is much less to it than meets the eye.” COAG is essentially an occasional meeting, with no formal basis, controlled by the prime minister, who calls the meetings and sets the agenda.⁸⁹ That the annual Loan Council meetings directly follow those of COAG is more than just a symbolic expression of the Commonwealth’s superior fiscal and policy powers. Emulating their Canadian counterparts, the states did attempt to establish a mechanism for collective action to engage more effectively with the Commonwealth and coordinate

85 Martin Painter, *Collaborative Federalism: Economic Reform in Australia in the 1990s* (Melbourne: Cambridge University Press, 1998).

86 Alan Fenna and John Phillimore, “Intergovernmental Relations in Australia: New Modes, Old Realities,” in Francesco Palermo and Elisabeth Alber (eds.), *Federalism as Decision-Making: Changes in Structures, Procedures and Policies* (Leiden: Brill, 2015), 192–212.

87 Alan Fenna and Felix Knüpling, “Benchmarking as a New Mode of Coordination in Federal Systems,” in Francesco Palermo and Elisabeth Alber (eds.), *Federalism as Decision-Making: Changes in Structures, Procedures and Policies* (Leiden: Brill, 2015), 315–338.

88 Saunders, “Cooperative Arrangement,” 421.

89 Fenna and Phillimore, “Intergovernmental Relations in Australia”; also see Geoff Anderson, “The Council of Australian Governments: A New Institution of Governance for Australia’s Conditional Federalism,” *University of New South Wales Law Journal* 31.2 (2008): 493–508.

their respective policies in a way that would obviate the need for Commonwealth intervention. After an initial burst of enthusiasm and action, however, the Council for the Australian Federation (CAF) soon languished.⁹⁰

There are two other mechanisms that demonstrate how the quest for uniformity in Australian intergovernmental relations supersedes whatever misgivings the states might have about Commonwealth domination.⁹¹ One is provided by the **referral power** under Section 51(xxxvii) of the constitution whereby state parliaments can transfer matters under their jurisdiction to the Commonwealth. All states have in this way handed over to the Commonwealth corporate matters and terrorism-related matters, for instance.⁹² The other mechanism is the extra-constitutional practice of **template legislation**, whereby all participating jurisdictions agree to adopt uniform legislative acts, usually following the template or model provided by the Commonwealth, in matters as diverse as aviation, commercial arbitration or consumer credit, in order to create a single national code administered by a single and separate regulatory authority.⁹³

The Intergovernmental Quest for Survival in Belgium

Arguably, the Australian example provides an extreme case of intergovernmental relations in the service of national uniformity under Commonwealth control. Belgium is an extreme case of a very different kind, a “bipolar federation”⁹⁴ in which the deepest fault line does not run between a separatist province and the “rest of the country” as in Canada, but between “different perceptions” of how the “common house” should be organized.⁹⁵ These different perceptions, of the French-speaking Walloons and the Dutch-speaking Flemings, have put Belgium on a trajectory of ongoing constitutional reform with no end or success in sight (see Chapter 5).

The creation of territorial regions as well as cultural communities, the absence of national parties with common ideological and cultural characteristics, and the

90 Jennifer Menzies, “The Council for the Australian Federation and the Ties That Bind,” in Paul Kildea, Andrew Lynch, and George Williams (eds.), *Tomorrow's Federation: Reforming Australian Government* (Leichhardt, NSW: Federation Press, 2012), 53–72.

91 See Saunders, “Cooperative Arrangements,” 418–20.

92 Andrew Lynch, “The Reference Power: The Rise and Rise of a Placitum?,” in Paul Kildea, Andrew Lynch, and George Williams (eds.), *Tomorrow's Federation: Reforming Australian Government* (Leichhardt, NSW: Federation Press, 2012), 193–209.

93 See Australasian Parliamentary Counsel Committee, *Protocol on Drafting National Uniform Legislation*, 4th ed. (2014).

94 Kris Deschouwer, “Kingdom of Belgium,” in John Kincaid and G. Alan Tarr (eds.), *Constitutional Origins, Structure, and Change in Federal Countries* (Montreal: McGill-Queen's University Press, 2005), 58.

95 Frank Delmartino, Hugues Dumond, and Sébastien Van Drooghenbroeck, “Kingdom of Belgium,” in Luis Moreno and César Colino (eds.), *Diversity and Unity in Federal Countries* (Montreal: McGill-Queen's University Press, 2010), 58.

adherence to linguistic parity in national executive governance make it all but impossible for an effective and stable federal "form" to be found. Instead, Belgian federalism has come to rely on intergovernmental negotiation and compromise as the quintessential "process" for its survival. Partly prescribed by constitutional fiat and partly practised by sheer political necessity, Belgian intergovernmental relations permeate politics and policy-making at almost every twist and turn.⁹⁶

Oddly for a culturally bipolar federal system, both chambers of the national legislature—the House of Representatives and the Senate—reflect the country's demographics rather than providing linguistic balance. This means that the Dutch linguistic group commands a majority in both chambers. The compulsion toward compromise thus finds particular expression in a number of constitutional and statutory provisions.

Article 4 regarding boundary changes to the linguistic communities provides a template for legislative decision-making that generally applies to so-called Special Laws. These are laws so designated because they deal with particularly sensitive questions of changes to institutions and the allocation of powers. They require linguistic majorities in each of the two chambers of the national legislature and a two-thirds majority in total.

Article 54 then contains the "alarm bell procedure": a motion signed by three-quarters of one of the linguistic groups in either of the two legislative chambers and expressing the concern that a bill may "gravely damage relations between the Communities" suspends a bill before final reading and refers it to the Council of Ministers (the cabinet composed of an equal number of French and Dutch speakers) for resolution.

These are formal procedures at the national level of government. But since all participants are elected members of regional parties or, in the case of the Senate, of the French and Dutch community councils (see Chapter 8), the process amounts to a novel kind of "intergovernmental intrastate federalism," as conflicts can be resolved only through bargaining and compromise. Several other provisions are more directly intergovernmental in nature.

Article 167 of the Belgian Constitution, which allows communities and regions to conclude international treaties and agreements within the scope of their powers, has led to the creation of a statutory intergovernmental foreign policy conference. It comprises representatives of all governments and deals with cases of treaties or agreements met with objection at either level of government. And a 1988 Special Law allows the federal state, regions, and communities to conclude cooperative agreements on the joint management of public services,

⁹⁶ The following is derived mainly from André Lecours, "Belgium," in Ann L. Griffiths (ed.), *Handbook of Federal Countries*, 2002 (Montreal: McGill-Queen's University Press, 2002), 63–65; Deschouwer, "Kingdom of Belgium," 57–61; Delmartino, Dumont, and Van Drooghenbroeck, "Kingdom of Belgium," 60–62.

common institutions, or even the distribution of powers as in the case of public transport, which was transferred from the national to the regional level.

The most importantly innovative intergovernmental mechanism in the fragile context of Belgian bipolar federalism, however, is a statutory Concertation Committee composed of the prime minister, five federal ministers, and six members of the regional and community governments.⁹⁷ The role of this committee, equally divided between French and Dutch speakers again, is not to settle legal power disputes, which are referred to the courts as elsewhere, but to work out conflicts of interest arising from what may be a perfectly legal use of powers. Any legislative assembly can, by means of a three-quarters vote of its members, refer the proposed bill of another legislative assembly to this Committee if it thinks that the bill harms its interests. The Committee then suspends the bill for up to 60 days while searching for a compromise.

Based on cooperative agreement, a final provision pertains to EU matters. If a European regulation or law falls into the responsibility of regions or communities, as is often the case, the agreement allows a regional or community minister to replace the federal minister in the European Council of Ministers. Obviously this requires prior intergovernmental cooperation on a common position, and this cooperation is usually successful since regions and communities have a common interest in defending their views at the European level. As happens in Spain,⁹⁸ it seems that "the EU plays a very important role in obliging the Belgian regions and communities to work together in a constructive way."⁹⁹

But it may not be enough. Just as it would appear that the Australian case of "deep uniformity" makes a travesty of intergovernmental relations if such relations are to be understood as a balanced system of bargaining and compromise, it would seem tempting to dismiss the Belgian case as an exercise in futility, as the federation might still fall apart. Yet it can also be appreciated as a laboratory of innovative intergovernmental practices complementing the federal form in cases of "deep diversity."

97 On this see in particular Lecours, "Belgium," 65.

98 See Tanja A. Börzel, "From Competitive Regionalism to Cooperative Federalism: The Europeanization of the Spanish State of the Autonomies," *Publius* 30.2 (2000): 17–42.

99 Deschouwer, "Kingdom of Belgium," 59.

10

Constitutional Amendment

FEDERALISM IS THE EXPRESSION OF CERTAIN principles and compromises. It is about the acknowledgement of territorial group rights and identities alongside individual citizen rights. Consequent upon this is the need for dual representation and a legislative process in which the representatives of both citizens and territorial collectivities co-decide by means of their respective majorities and in which a division of powers ensures that the constituent units have meaningful levels of self-governing authority. Characteristic of federations is the way in which these structural guarantees are written into a codified constitution. Indeed, federalism has contributed significantly to the development of what we now think of as “a constitution.”

However, there has to be something else: a guarantee that the terms of agreement expressed in the founding document stay in place unless there is broad consensus for change: “The law of the constitution must be either legally immutable, or else capable of being changed only by some authority above and beyond the ordinary legislative bodies.”¹ How broad must that agreement be? If we think of the original constitutional compromise as a kind of treaty or “compact” among equal partners, only unanimity will do. Each and every participant has a veto right over constitutional changes. Somewhere between that rigidity at one extreme, and the flexibility of plain majority rule at the other, lies the typical level of agreement required in federal systems. It is a logical feature of any constitution—but particularly a federal one—that it includes not only rules about the political system it is describing, but also rules about itself. Constitutions need to contain provisions for their own amendment, provisions that stipulate what consensus threshold must be achieved to change the rules of the game. Such rules have a dual quality: on the one hand, they “entrench” a constitution by protecting it against opportunistic change; on the other hand, they make a constitution flexible by providing an understood and authoritative mechanism for amendment. Such rules preserve a distinction between the “constitutional politics” around formal amendment to the rules, and the “ordinary politics” around normal legislative enactment within that framework of rules as well as the judicial interpretation of those rules (see Chapter 11).²

1 A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1915), 142–43.

2 David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776–1995* (Lawrence: University Press of Kansas, 1996).

In the context of federalism, constitutional amendment includes everything from minor adjustment to significant reconfiguration of the division of powers, institutional reform, or even—at the most extreme—secession. Both the amendment procedures and the experience of constitutional amendment vary significantly from federation to federation. For older federations in particular, there has been a long process of struggling to adapt an original division of powers to the changes that have occurred over a century of modernization. In some federations, amendment procedures have proven sufficiently strict to prevent all but a few changes being made to the original compact, leaving necessary adaptations to be accommodated through either judicial interpretation or administrative and political means (as we discussed in Chapters 7 and 9). In others, incremental changes have occurred quite regularly.

While we focus on formal constitutional amendment in this chapter, it is important to appreciate that federal systems adapt to changing conditions in a variety of ways. Adjustments to the federal order as originally agreed upon are not always, and perhaps not even primarily, the result of formal changes to the constitutional text.³ Adjustments thus occur not only *explicitly* through formal amendment but also *implicitly* through “ordinary politics”: when governments extend their legislative, fiscal or administrative activities into “areas of contested responsibilities,” and this extension is approved by “judicial sentencing,” as we will discuss in the next chapter;⁴ or when governments work around the written constitution by means of intergovernmental agreements, as we saw in the previous chapter.

Amendment Procedures

Federal constitutions could conceivably be bound by the rule of unanimous consent: change can only be made to the founding agreement if all parties to that agreement agree. Such a tough requirement, however, not only would make change exceedingly difficult, but would also fail to reflect the nature of a federal as distinct from a confederal union. The bar must be set high enough to prevent partisan change, but not so high as to prevent *all* change. As a compromise, then, federal constitutions typically rely on special majority requirements. These may be **super majorities**, such as the two-thirds approval by both legislative chambers in Germany; or **multiple majorities**, such as passage by parliament and by voters in a referendum as in Australia, or passage by the legislature on separate occasions with an intervening election; or some combination of the above, such

3 Richard Simeon, “Adaptability and Change in Federations,” *International Social Science Journal* 53.167 (2001): 145–52.

4 See Bruce Ackerman, *We the People: Foundations* (Cambridge, MA: Harvard University Press, 1991); Nathalie Behnke and Arthur Benz, “The Politics of Constitutional Change between Reform and Evolution,” *Publius* 39.2 (2009): 216–17.

as passage by a two-thirds vote in the two houses of Congress and ratification by four-fifths of the states in the United States. As one might expect, amendment rules tend to mirror adoption rules: the procedure that was stipulated for ratification of the constitution in the first place is reflected in the process stipulated for subsequent amendment. In some cases, these rules force proposed constitutional changes to run a virtual political gauntlet in order to be accepted.

Adjusting to Changing Needs

Precisely because of the legalism inherent in the constitutional set-up of federal systems, and because of the impact such a legalistic predisposition will have upon political culture all the way down to popular perceptions of right and wrong, there is a certain rigidity to constitutional federalism. This rigidity is intentional. The formation of federal states, it is worth recalling, entailed a compromise on the road to modern statehood when a unitary political system was not to be had in the first place. At the bargaining table, the original participants wanted assurances about their irrevocable powers and rights written in constitutional stone. Once turned into vested governmental interests, agreement for adjustments to the allocation of these powers would not come lightly. The degree and extent to which such adjustments occur depends on a number of factors.

One of these is the constitutional document itself. If it is a parsimonious declaration of general principles, as in the American case, adjustments will be difficult and complicated because they inevitably amount to major reconfigurations with multiple consequences. If it is a detailed document breaking down general power assumptions into detailed prescriptions of power allocation for specific policy tasks, as in the German and Swiss cases, adjustments can more easily occur as minor alterations.

Another factor is of course the amendment procedure itself. High super-majority requirements present significant hurdles, as is the case in the United States. The two-step process of adoption by the national legislature first and then ratification by the states or provinces afterwards deliberately raises the threshold as well. A temporal factor may also work against success: the more time is allowed to lapse between step one and two, the more likely it is that political opinions shift or subnational governments change. A one-step process as in Germany—more or less synchronous adoption by the two chambers of the bicameral legislature—considerably lowers the threshold.⁵

And finally, any reconfiguration of powers will be difficult in the wake of real underlying conflict, either cultural or economic. This is particularly so in asymmetrical federations such as Canada, which has stumbled through a series

⁵ Thomas O. Hueglin, "Comparing Federalisms: Variations or Distinct Models," in Arthur Benz and Jörg Broschek (eds.), *Federal Dynamics: Continuity, Change and the Varieties of Federalism* (Oxford: Oxford University Press, 2013), 35.

of political crises in search of a constitutional formula accommodating franco-phone minority interests.

Constitutions are complicated power puzzles, regardless of whether they stipulate general principles or provide detailed prescriptions. Substantive constitutional amendments therefore can easily turn into a *quid pro quo* of inter-governmental haggling: a perceived or real power shift in one area may trigger compensating demands in another. As we will see, Canada is an exceptional case, not only because of its culturally asymmetrical nature, but also because its constitution lacked an amendment provision altogether until 1982. But even in Germany, a recent attempt at thorough constitutional reform—the desirability of which was widely recognized—required the establishment of an intergovernmental reform commission and protracted negotiations, and, in the judgement of most, ended up with rather modest results.

Who Should Have a Say?

In principle it seems appropriate that the bodies that had agreed to the original constitution also should have a say in its amendment. Such an approach helps satisfy those submitting to the new order that they are not losing control of their constitutional destiny. Depending on the circumstances and values, then, amendment procedures may grant authority primarily to national legislatures, national and subnational legislatures, or even national legislatures and the people themselves.

Assuming that the national legislature is bicameral, with a second or upper chamber representing subnational interests, the first option at least contains a minimal double-majority element—which thus includes some sort of brake on unalloyed majoritarianism. On the face of it, the granting of authority over the constitution to the national legislature alone is not consistent, however, with federalism or likely to emerge from the process by which a federation was created in the first place. It suggests that one order of government possesses the power to make unilateral alterations to the relationship between the two orders of government. The exception to this is where the national legislature itself has a strongly federal character and incorporates some sort of subnational veto power into its decision-making process, as, uniquely, the German *Bundesrat* does. The standard pattern is for the national legislature—acting as repository of the national will—to generate proposals for constitutional change, and for the constituent units of the federation to have an independent voice in the procedure. This approach incorporates a much more substantial double- (or triple-) majority requirement.

A separate and additional consideration is raised by the principles of constitutionalism in a democratic society: should the people's representatives, in whatever combination, have the power to alter the institutions through which they govern without the express consent of the people? Thus a third possibility is for

constitutional amendments to require some form of popular ratification through a referendum process.

How High a Threshold?

If one criterion is concerned with who should get to participate, another relates to what level of approval should be required. The default option for democratic processes is the simple, or ordinary, majority—50 per cent plus 1 of the votes cast. This is a rather modest requirement. It is particularly vulnerable, first, to the problem of narrow partisan majorities (should 51 per cent of the population be able to rule over 49 per cent of the population?). But it is also vulnerable to manipulation of the process by the calling of votes when opposition ranks are temporarily depleted. Bumping up the requirement a notch, some federations require an absolute majority: 50 per cent plus 1 of all those eligible to vote. This guards against transient majorities, but not against the problem of narrow partisan majorities. Therefore, it is more common to require super majorities. India, Germany, and the United States require a two-thirds super majority in the legislature; Brazil and Spain require three-fifths; and South Africa requires three-quarters.

In Canada since 1982, there is even a unanimity requirement for amendments related to specific matters such as parliamentary representation and language policy. In the United States, equal Senate representation cannot be taken away from a state without that state's consent; no state can be overruled by any form of majority.

Who Gets to Propose?

A question of considerable importance is who has the right to *initiate* constitutional change. While having a veto power is very important, it is not the same as having the power to initiate. Veto efforts have to be successful every time a proposal arises; initiating efforts only have to be successful once. Repeated efforts may overcome a veto under conducive conditions (notably periods of national emergency), and this puts the excluded party at a significant disadvantage. The result may be some sort of ratchet effect whereby change occurs only in one direction, typically a centralizing one.

And indeed, in most federations, the initiative lies with the national government, and bills can usually be introduced in either of the two chambers. As in the case of the American, Australian, and Indian constitutions, for instance, this deprives the states of the opportunity to initiate constitutional change in their favour and thus contributes to the centralist bias built into most federations. However, there are exceptions. The US Constitution allows the states to call a constitutional convention. The Canadian *Constitution Act 1982* allows the provinces to initiate amendment. In Brazil, a majority of the state legislatures can propose an amendment. In Spain, the autonomous communities can request consideration of an amendment, individually or collectively, from the central

government or from the lower chamber. In the latter case, up to three members of a particular autonomous community can appear before that chamber to defend their initiative. And finally in Switzerland, the people themselves can initiate constitutional change.

Out of Bounds?

A final question is whether there should be absolute limitations placed on constitutional change. From the perspective of parliamentary democracy and popular sovereignty, this may seem a strange proposition. With all the additional caution built into the process of constitutional amendment, why should some matters be ruled out of bounds altogether? The designers of the classical federations in the eighteenth and nineteenth centuries obviously did not think so and simply did not mention any.

India's constitutional designers in the twentieth century even went a step further by making the omission explicit. "For the removal of doubts," they wrote into the amending formula of Article 368, "it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article." Being free of imperial shackles for the Indians obviously also meant being free of constitutional shackles. In the words of one of the framers, "One can . . . safely say that the Indian Federation will not suffer from the faults of rigidity or legalism. Its distinguishing feature is that it is a flexible federation."⁶

Perhaps the Indians were inspired by the long British tradition of unconstrained parliamentary supremacy. Drafting their constitution at the same time as the Germans, and with an entirely different set of political concerns in mind, the Germans clearly were not. In order to secure democracy, the designers thought that certain fundamental principles had to be made non-negotiable. To this effect, they inscribed into the amendment formula of the Basic Law what indeed amounts to absolute limitations for constitutional change. Article 79(3) unambiguously stipulates that amendments regarding the division of the federation into *Länder*, the participation of the *Länder* in national legislation, and the catalogue of basic individual rights and freedoms are "inadmissible."

Germany is not the only case of imposing limits to constitutional amendment. Brazil has a similar list of non-amendable components that also includes democratic voting rights. And the Spanish Constitution contains a stipulation whereby amendments may not be made during periods of national emergency as declared by the absolute majority of the House of Representatives at the exclusive proposal of the government.

⁶ Quoted in Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford: Oxford University Press, 1966), 255.

There were historical reasons for these limitations. The Germans had just gone through a period of totalitarian dictatorship that had used popular support and technically valid procedures to suspend basic rights and abolish all forms of decentralization. Brazil and Spain had lived through similar periods of authoritarian legislative abuse. The question remains how such limitations can be justified in terms of democracy. In the case of basic individual and human rights, the justification is couched in an acknowledgement that these are natural rights of a value higher than all human legislation. It is more difficult to find a justification for the removal of the federal form of government from the agenda of potential constitutional change. Clearly, the German and Brazilian framers felt that, after a period of centralized dictatorship, federalism as a system of divided governance and mutual control had to be constitutionally enshrined as indispensable for the safeguarding of democracy.

Constitutional Permanence in the United States

The US Constitution is the oldest written national constitution still in force;⁷ and indeed the only country with a longer uninterrupted constitutional history would be the United Kingdom—which does not have a constitution in the same (written or codified) sense at all. Over a span of more than 200 years, only 17 amendments have been made to the original text since the first 10 amendments were added as part of the original ratification package. The Germans, by contrast, made over 100 changes to their constitution during the first 27 years of its existence.⁸ And the Americans themselves have passed over 5,000 amendments to their state constitutions.⁹

The Amendment Procedure

It was the problem of amendment that led to the drafting of the US Constitution in the first place. As a confederal rather than federal order, the *Articles of Confederation* had stipulated a unanimity rule for amendment. When desperately needed changes were stymied by the ability of one state alone to hold out against all the others,¹⁰ the basis was laid for a plenary reconsideration of the existing constitutional arrangements. At the Philadelphia Convention, the creation of

7 There are older ones at the subnational level, notably the Constitution of the Commonwealth of Massachusetts, which dates back to 1780.

8 Klaus von Beyme, *Das politische System der Bundesrepublik Deutschland* (München: Piper 1987), 29.

9 Kermit L. Hall, "Mostly Anchor and Little Sail: The Evolution of American State Constitutions," in Paul Finkelman and Stephen Gottlieb (eds.), *Toward a Usable Past: Liberty under State Constitutions* (Athens: University of Georgia Press, 1991), 395.

10 By Rhode Island in 1781 and New York in 1783. Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: University Press of Kansas, 1985), 171.

a federal rather than a confederal form of government involved, among other things, the shift to a slightly more flexible amendment procedure, one that still requires broad consensus but not unanimity. For several commentators, it was, however, "one of the Founders' most serious mistakes," that they did not move further away from confederal thinking and toward a reasonably flexible amending procedure.¹¹

According to Article V, section 1, constitutional amendments require a two-step process of proposal and ratification. Proposals must pass by two-thirds majorities in both houses of Congress, or be passed by a special national convention convoked by the Congress at the request of two-thirds of the state legislatures. The latter method has never been used, though the possibility of its being used may have had an impact on constitutional politics. Following passage through Congress or a constitutional convention, the proposed amendment must then be approved by the legislatures or special ratifying conventions of three-quarters of the states.

A particular issue in the American two-step process of constitutional amendment has been the time limit allowed for ratification. The constitution is silent on this issue. Only beginning with the Eighteenth Amendment proposed in 1917 did the Congress begin to impose a seven-year time limit.¹² Two years after successful ratification, the Supreme Court ruled that the Congress could do so as a proper exercise of its powers. With reference to the four amendments still pending—or languishing—at the time, two dating back to 1789, the Court further affirmed that proposals made by "representatives of generations now largely forgotten" and therefore no longer "sufficiently contemporaneous" should no longer be open to ratification.¹³

It thus came as a surprise when one of these proposals pending since 1789—requiring that congressional pay increases take effect only after an intervening election—came to be ratified in 1992 as the Twenty-Seventh Amendment.¹⁴ Long since considered lapsed, this proposal was resurrected in a political campaign during the 1980s when the issue of congressional pay was obviously deemed "sufficiently contemporaneous." Originally, only 6 of the 13 states had ratified it, falling well short of the three-quarters requirement. By 1992, the required ratification by 38 out of 50 states had taken 203 years.

11 Dennis C. Mueller, "On Amending Constitutions," *Constitutional Political Economy* 10.4 (1999): 395.

12 This was the amendment on prohibition, the only amendment to be repealed, by the Twenty-First Amendment in 1933.

13 *Dillon v. Gloss* 256 U.S. 368 (1921).

14 Of the 12 amendments proposed in 1789, only 10 were ratified—as the so-called Bill of Rights.

The rationale for these multiple super-majority requirements—a proposal by two-thirds majorities in the House of Representatives and the Senate as well as, in a second step, ratification by three-quarters of the states—was to make the US Constitution invulnerable to opportunistic change. The framers ensured that only those changes would be made that represent, as President Washington put it in his farewell address of 1796, “an explicit and authentic act of the whole people.”¹⁵

The Record of Amendment

In this respect it seems the framers knew what they were doing. Over 10,000 initiatives for amendment have been put to Congress, including abolition of the Senate, making interracial marriages illegal, limiting individual income tax to 25 per cent, and even renaming the United States of America as “United States of the Earth.” However, only 33 of these ever became formal proposals by clearing the two-thirds hurdle in both houses of Congress. In turn, 27 of those have been ratified by the states. It is possible to see the proclivity for constitutional change in the United States in an even narrower light. The first 10 amendments, known as the Bill of Rights, were the result of promises during the constitutional ratification debates and were thus part of the original constitutional compromise. “Demands for a national bill of rights predated, accompanied, and even . . . made possible the adoption of the Constitution.”¹⁶ That would leave only 17 truly subsequent amendments, a number that Germany has sometimes surpassed within one legislative period.

Of the six amendment proposals not ratified, four are still technically pending because no time limit was imposed, and two have lapsed due to such a time limit. Overall it would seem that the two-step process of amendment in the American case has not been a crucial factor for success or failure. The bicameral super-majority requirement for congressional proposal filtered out the vast majority of amendment initiatives that did not stand a good chance of ratification by the states.

What Has Been Changed by Amendment?

In the American case, most amendments have had to do with civil rights or the functioning of the presidency, and only a few with federalism and the division of powers. The US Constitution has never been amended to alter the division of powers by transferring authority from one level of government to the other; however, it has been amended in ways that have significantly affected the relative power of the two levels of government.

¹⁵ See Kyvig, *Explicit and Authentic Acts*, 1.

¹⁶ Richard B. Bernstein and Jerome Angel, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?* (New York: Times Books, 1993), 47.

By insisting that due process requirements contained in the Bill of Rights applied to the states, the Fourteenth Amendment of 1868—introduced three years after the Civil War and the abolition of slavery—established justiciable limitations on the states' ability to circumvent uniform civil-rights standards throughout the nation. It thereby marked a significant centralization of power, and it could do so only by ignoring the requirements of Article V, steamrolling the defeated southern states by forcing them to ratify.¹⁷ The Seventeenth Amendment of 1913 introduced popular election of senators. This did not alter the division of powers in the constitution, but as we saw in Chapter 8, it may well have influenced the division of powers in practice. By removing senatorial elections from state government control, the Seventeenth Amendment lessened the Senate's tendency to act as a "house of the states." The Sixteenth Amendment of the same year proved to be directly intrusive upon state powers because it cleared away obstacles to Congress's introducing a national income tax and thereby laid the basis for fiscal dependence of the states and hence their policy subordination, as we noted in Chapter 7.

That is the sum total of changes to American federalism through formal constitutional amendment over more than two centuries of operation. As we will see in Chapter 11, Article V has been the poor cousin of constitutional change by comparison with the Supreme Court's dominant role in the evolution of American federalism.

Canada: Patriation Games

The Americans understood very well that the original federalist compromise would stand the test of time only if it were firmly anchored in a constitutional document that was very difficult to alter without the kind of consent that was required to establish it in the first place. All the more surprising, then, is that the *British North America Act* of 1867 (*BNA Act*) was altogether silent on the matter of amendment. This was not so much a thoughtless omission as it was an expression of the "continued colonial relationship to the government of Great Britain."¹⁸ As evidenced by the founding debates, it never really came up as an issue.¹⁹ The lack of an agreed-upon formula for constitutional change inadvertently lent support, however, to a compact theory of Canadian federalism according to which changes to the original constitutional agreement would require agreement among all provinces.

¹⁷ Ackerman, *We the People*, 44–45.

¹⁸ Richard Simeon and Ian Robinson, *State, Society, and the Development of Canadian Federalism* (Toronto: University of Toronto Press, 1990), 20.

¹⁹ Janet Ajzenstat, Paul Romney, Ian Gentles, and William D. Gairdner (eds.), *Canada's Founding Debates* (Toronto: Stoddart, 1999).

The amendment issue led to protracted constitutional dispute in the twentieth century, when the last vestiges of colonialism were finally shed. It culminated with the eventual "patriation" of the constitution by the government of Prime Minister Pierre Trudeau in 1982, a set of constitutional revisions that also included, finally, a domestic amendment procedure. This was a most extraordinary event that in many ways amounted to rewriting the original compact of federation. Proceeding without the consent of Québec, however, seriously jeopardized its legitimacy and left the country with an ongoing crisis fuelled by that province's continued threats of secession.

The Procedure You Have When You Don't Have a Procedure

Over its more than 130 years of existence, the Canadian Constitution has been changed about as many times as its American counterpart—21 times before patriation in 1982.²⁰ The constitution until then was an Act of the British parliament and as such also could be amended only by that parliament. However, the British parliament would do so upon the advice and consent of the Canadian parliament, and it would enact all amendments thus requested. Since Canada was a federation, a problematic and contentious question was the extent to which the provinces should be involved in constitutional change. Formally, they were not given a role at all. A constitutional convention developed, however, according to which the Canadian parliament would not request an amendment pertaining to the division of powers "without consultation and agreement with the provinces." And while the federal government on occasion disputed that this convention was binding, it did secure unanimous provincial consent for the three amendments that constituted a transfer of provincial powers to the national level: unemployment insurance (1940), old age pensions (1951), and supplementary benefits to old age pensions (1964).

Those among the founding fathers hoping to create a *faux* federation that would settle into a unitary mould might have thought that unilateral action—a parliamentary resolution routinely approved by Westminster—without formal provincial input would bring about the changes deemed necessary to future federal governments. However, when it came to the first of the three amendments affecting the constitutional division of power, Prime Minister Mackenzie King was careful in obtaining unanimous provincial consent—i.e., including Québec—before taking the request to London. In doing so, he set a precedent for provincial consultation and consent and acknowledged political reality: if serious conflict was to be avoided, constitutional change required provincial

20 On this and the following see James Ross Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects* (Ottawa: Ministry of Supply and Services, 1996), 9–21; Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 3rd ed. (Toronto: University of Toronto Press, 2004).

agreement.²¹ Just how much agreement—unanimous or merely substantial by means of some super majority as in other federations—would become the most controversial issue in the long and agonizing process of finally bringing the constitution home.

Patriation

While the process of “patriation” was set in motion in 1931 when the British parliament passed the *Statute of Westminster* recognizing the full legal autonomy of Britain’s dominions, domestically it only developed momentum in the 1960s. Among the many more intergovernmental attempts to come to an agreement, two stand out because they foreshadowed the eventual outcome:²²

□ The *Fulton-Favreau formula* of 1964 proposed unanimous adoption of constitutional change by parliament and the provincial legislatures in matters directly affecting provincial powers. In most other matters of significance to the federal system, two-thirds of the provinces representing at least 50 per cent of the Canadian population would have to concur. The 50-per-cent rule meant that affirmation from either of the two central provinces of Québec or Ontario was necessary, but it was not required from both.

□ The *Victoria Charter* of 1971 contained an amending formula based on regional representation. Again, there was a unanimity requirement for some amendments, but others could pass with the approval of Ontario, Québec, and two Atlantic and two western provinces. It also included a bill of rights.

Each proposal was rejected by Québec. A decade later, after the first separatist referendum in Québec, Prime Minister Trudeau forced the issue by announcing that he would seek approval unilaterally from Britain for constitutional patriation, including an amending formula and a charter of rights and freedoms, without unanimous or even substantial provincial support if necessary. Only two provinces supported Trudeau’s move, which presumed that unilateralism was constitutional under the stipulations of the *BNA Act*. In a “reference case” (see Chapter 11) brought before it by the eight dissenting provinces, the Supreme Court ruled, in what was widely criticized as one of its most controversial judgments, that unilateral patriation was legal but in violation of a constitutional convention requiring at least “substantial” consent of the provinces. Arguing that this was a political rather than legal issue, the Court abstained from specifying

21 William S. Livingston, *Federalism and Constitutional Change* (Oxford: Oxford University Press, 1956), 60.

22 See Simeon and Robinson, *State, Society, and the Development of Canadian Federalism*, 203–11.

what “substantial” meant except to say that the support of only two provinces most certainly was not.²³

Not least because Britain was now unlikely to pass a constitutional package unless it was carried by substantial provincial support, the ruling forced Trudeau back to the bargaining table. Eventually, he forged a deal with the nine anglo-phone premiers, which was to become the *Constitution Act 1982*. In essence, it re-activated the Fulton–Favreau formula of 1964 and added a charter of rights as proposed by the Victoria Charter.

As Trudeau reflected later, by rejecting both unilateralism and unanimity, the Court had “embraced the ‘Canadian way,’ supporting both sides and forcing a political compromise.”²⁴ If this was controversial, then it was only because it gave expression to the ambiguous nature of the Canadian federation, in which the principle of unilateralism lingered on in the Westminster tradition of parliamentary supremacy; the principle of unanimity reflected Québec’s distinct need for cultural protection; and the principle of substantial provincial consent—i.e., a super majority—reflected the prevalence of federalism over confederalism. The amending formula itself, finally signed into constitutional law 115 years after the birth of Canada as a country, incorporated all three principles.

The Amending Formula

Reflecting the complexity of modern statehood and governance in a society divided by regional and cultural fault lines, the amending formula enshrined in Part V, Sections 38–49, of the *Constitution Act 1982* contains five different procedures for constitutional change (see Box 10.1). These include categories of amendment that require a super majority as in most other federations—ratification by the governments of two-thirds of the provinces representing more than 50 per cent of the population; categories that require unanimous support of the governments of provinces; and even, at the other extreme, instances when the Parliament of Canada can act unilaterally. Notable by its absence is any introduction of a Swiss- or Australian-style role for the people in this process—a decision that reflects the fact that the entire patriation exercise was carried out without reference to the people.

As is readily evident, this is not anything like the concise, one-size-fits-all, amendment procedure in the US Constitution. Instead, it is a more nuanced enumeration of ifs and whens, which echoes the pattern established in the Indian Constitution: tailoring the method to suit the subject matter. Particularly noteworthy are the opting-out provisions under the qualified majority procedure. Seven or more provinces representing 50 per cent of the Canadian population can agree to give parliament the power to establish a major new social program,

23 See Hurley, *Amending Canada’s Constitution*, 58–59.

24 Cited in Hurley, *Amending Canada’s Constitution*, 60.

Box 10.1 Amendment Rules in the *Canadian Constitution Act 1982*

1. A general procedure requiring majority approval by Senate and House of Commons as well as two-thirds (seven) of the provincial legislatures representing at least 50 per cent of the Canadian population (section 38); such an amendment will not apply to a province the legislature of which declares its dissent; if the exemption of a province from such an amendment concerns education or culture, that province will receive reasonable compensation by the federal government for its own exercise of that power (section 40); however, opt-outs are not permitted for a variety of specific issues such as proportionate representation of the provinces in parliament and the creation of new provinces (section 42).
2. A unanimity procedure requiring approval by Senate and House of Commons as well as all provincial legislatures for specifically enumerated matters such as the monarchy, the minimum number of parliamentary seats for a province, the composition of the Supreme Court, and the general use of French and English (section 41).
3. A bilateral procedure for matters affecting only one or several but not all provinces, such as boundary changes and language use within a province; in this instance, approval is required by Senate and House of Commons as well as by the provincial legislature(s) to which the amendment applies (section 43).
4. A unilateral procedure whereby parliament alone can amend matters in relation to the executive government of Canada or the Senate and House of Commons (section 44).
5. And finally, a procedure whereby provincial legislatures can amend their own constitutions (section 45).

for instance. At the same time, one or a minority of provinces can declare that they do not want to be part of that program.

The original suggestion as put forward by eight of the ten provinces, including Québec, was to compensate all provincial opt-outs. The final deal of November 1981, reached without Québec's consent, dropped the compensation idea altogether. In an unsuccessful last-minute attempt at reconciliation, compensation was reinstated before final ratification of the *Constitution Act 1982*, albeit only for matters of education and culture, but not for much more costly social programs.

In one way, these provisions for constitutional change may appear as an almost desperate attempt to accommodate the need for asymmetrical policy and program flexibility without giving up the idea that a constitution has to apply to all constituent parts equally and symmetrically. However, the settlement of 1982 can also be appreciated as a balanced approach to maintaining the original compromise. The inclusion of a charter of individual rights, on the other hand, constituted a deliberate attack on Québec's collective cultural identity—since Québec's traditional language policies could now be challenged before the Supreme Court as violations of individual rights. Judicial interpretation and review on that basis could interfere with Québec's political agenda in a way that

had not been possible before. It is chiefly for this reason that the constitutional deal of 1982 was rejected by the government of Québec.

Aftermath and Record

Two unsuccessful attempts were subsequently made to end Québec's constitutional isolation. The Meech Lake Accord of 1987 contained an extended list of constitutional amendments requiring unanimous approval. But it was the recognition of Québec as a "distinct society" that sealed its fate. The die-hard champions of constitutional symmetry could not or would not see that this more symbolic than substantive gesture toward Québec was far less significant than the opting-out provisions of the amendment formula. The Accord died in 1990 when two provinces failed to ratify it in time.

The Charlottetown Accord of 1992 more or less contained the same provisions on constitutional amendment and, as a major concession to western provinces in particular, the so-called triple-E Senate, as discussed in Chapter 8. This was put to the people in a national referendum—a first in Canada for constitutional amendment. It was narrowly defeated, however, in most provinces including Québec. Although the referendum was only consultative, the result was taken as decisive.

The difficulty of the Canadian situation is its extreme asymmetry, with nine primarily anglophone provinces and one predominantly francophone province, a large number of whose denizens regard themselves as forming a distinct nation. As we saw before, changing the original constitutional agreement of a federation typically requires some sort of super majority. In the case of Québec, however, anything short of a veto cannot really be satisfactory. Under the Fulton-Favreau formula, it would have gained such a veto alongside all other provinces. Ironically, Québec's dissent in this instance was based on the fear that its own desire for constitutional change could be blocked by another province. The Victoria Charter, on the other hand, was rejected because it left the door open for national social policy programs in areas where Québec wanted autonomy.

It would be easy to view all this as intransigence. In reality, as the failures of the Meech Lake and Charlottetown Accords illustrate, making substantive changes to the original federalist compromise almost inevitably amounts to disentangling that compromise in all of its component parts. To find a new one, in a much more complex world, and among a much larger number of participants with their vested interests, naturally proves to be very difficult.

Yet the Canadian amendment provisions of 1982 can also be appreciated generally as a modestly flexible adjustment to that complexity. While the general 7/50 procedure—i.e., agreement by seven or more provinces representing 50 per cent of the population—has been used only once (strengthening Aboriginal rights under the constitution in 1983) and in all likelihood will not be used again in the foreseeable future, there have been seven bilateral amendments (including

the replacement of denominational school boards with linguistic ones in Québec in 1997) as well as three unilateral amendments (e.g., the granting of Senate representation to the new territory of Nunavut in 1999).

Even the flexible removal of matters seemingly unrelated to the division of powers from the onerous unanimity or 7/50 amendment procedures has not ended controversy or even possible constitutional conflict. In 2013, the federal government asked the Supreme Court of Canada for a reference on senate reform or even abolition. In hearings before the court, the government maintained that it could reform the Senate by imposing term limits and introducing an electoral process for senators under the unilateral amendment procedure of section 44, and that abolition required only provincial majority approval under the 7/50 procedure of section 38. Unsurprisingly, the provinces begged to differ. A majority argued that reform would at least require provincial approval under the 7/50 formula. With regard to abolition, the small Maritime provinces in particular argued that unanimity was required because the Senate, in which they are massively overrepresented, was specifically created in this way on their behalf. As widely predicted, the Supreme Court of Canada held that substantive senate reform would indeed require a constitutional amendment under the 7/50 formula, and abolition would require unanimous agreement of Senate, parliament, and all provincial legislatures.²⁵

Constitutional Flexibility in Germany

The German Basic Law is a lot more straightforward than either the American or the Canadian constitutions. Similarly, amendment is easier and has occurred more frequently. This is for at least four reasons. First, the procedure itself is less demanding and in particular relies much less on multiple majorities. Second, the constitution is a more practical and detailed document than an iconic one, and so it is much more conducive to practical and detailed adjustment. Third, Germany's system of administrative federalism is much less liable to polarized conflict over such changes and adjustments. And fourth, the depth of underlying differences has simply not been there.

The German Amendment Procedure

The provisions regarding constitutional amendment in Article 79 of the Basic Law are clear and simple (see Box 10.2).

One can easily see the effort at avoiding constitutional ambiguity as much as possible. Particularly noteworthy is the first stipulation, known as *Textänderungsgebot* (obligation to change the existing text). It came about as a reflection on the legal insufficiencies of the Weimar Constitution. At that time, amendments could be made simply in addition to the constitutional text. This

²⁵ *Reference re Senate Reform* SCC 32 (2014).

Box 10.2 Amendment Rules in the German System

1. Amendment can be made only by a law that expressly changes or supplements the constitutional text. In the case of obligations under international treaties appended to the constitutional text, only an explicit clarification is necessary that these do not contravene any other provisions in the Basic Law.
2. Amendments must be approved by two-thirds of the members in both legislative chambers, the *Bundestag* and the *Bundesrat*.
3. Core elements of the constitution cannot be amended at all. These include protection of individual rights; the democratic nature of the system; and, most importantly for our purposes, the existence and role of the *Länder*.

led to constitutional ambiguity, as amendments could contradict or even erode constitutional rights without explicitly saying so. The stipulation is therefore meant to maintain constitutional clarity.

The most important aspect of the German amendment provisions from a comparative federalism perspective, though, is the fact that there is no subnational ratification process; the national parliament alone amends the constitution. On the face of it, this contradicts the federal principle that the rules governing the relationship between the two levels of governments must not be susceptible to alteration by one level alone. However, the existence of the upper house as a true house of the states addresses this problem. The delegates of the *Länder* governments vote in the *Bundesrat*, ensuring direct subnational participation in the amendment process. While the super-majority requirement in both houses typically governed by different party coalitions still provides a high threshold and thus ensures broad agreement for constitutional adjustment, the one-step process eliminates the possibility that the agreement could fall apart during a subnational ratification process later on.

Finally, certain provisions are exempted from constitutional change altogether, which again is a reflection of the experience with the Weimar Republic and its quasi-legalistic transformation into the Nazi dictatorship. Article 1 of the Basic Law proclaims the inviolability of human dignity and declares that the legislature, the executive, and the judiciary shall be bound by the subsequent catalogue (Articles 2–19) of fundamental rights as directly enforceable law. Article 20 then declares categorically that Germany is to be a democratic and social federal state. The so-called *Einigkeitsklausel* (eternity clause) of Article 79 explicitly refers to Articles 1 and 20. In this way, regarding the federal order, Articles 20 and 79 amount to a constitutional guarantee of federalism.

Other constitutions also contain eternity clauses for a variety of matters, but there is no other constitution excluding the federal order from amendment. Thus, in Germany, federalism has been recognized as an inviolable part of a democratic and social political order. This does not mean, however, that constitutional questions regarding federalism are entirely removed from the sovereignty of the

people. For instance, the federal order would still be maintained by changes to the *Länder* boundaries, or, as in the case of reunification, a change in the number of *Länder*. Also, Article 79 itself is not exempt from amendment and could be removed—although the courts would likely interpret this as an impermissible violation of the spirit of the Basic Law. And finally, the German people could of course decide to give themselves an entirely new constitution (Article 146).

The Experience with Constitutional Amendment

Between 1951 and 1996, the German parliament passed 43 laws amending the constitution.²⁶ Since each of these laws can and, as a rule, does affect several constitutional articles, by inserting new ones and either amending or deleting existing ones, the actual number of constitutional amendments is in the hundreds. Thus the German Constitution has proven itself readily adaptable.

By contrast with the American case, and much more significantly than in Canada, amendments to the German Constitution have also modified the division of powers between the two levels of government. Three rounds of changes were of particular importance. In the late 1960s, the so-called joint tasks were added; in the early 1990s, the reach of the necessity clause in Article 72(2) was tightened, and provisions were made for *Länder* participation in EU affairs; finally, in 2006 the entire division of powers was recalibrated in a major reform package, the results of which were discussed in Chapter 6.

The constitutional changes of the 1960s were made in order to serve a more cooperative spirit of federalism. At the time, in a general political climate of Keynesianism, there was widespread consensus, in Germany as elsewhere, that society would benefit from highly coordinated strategies of socioeconomic planning. The “joint tasks” were meant to oblige both levels of government to develop “effective mechanisms” of cooperation between formally independent levels of government. However, the resulting power entanglement soon came to be criticized. Instead of improving policy-making efficiency through cooperation, it was argued that cooperation led to a loss of political capacity at each level of government.²⁷

By the early 1990s, both political reality and the ideological climate had changed dramatically. The accession of six mostly impoverished East German *Länder* posed enormous material challenges to the spirit of cooperative governance. Moreover, now in an era of neoliberalism, the rich *Länder* in the west demanded a more competitive and disentangled federalism. While the “joint tasks” remained untouched, Article 72(2) was altered from a “clause of need”

26 Heinz Laufer and Ursula Münch, *Das föderative System der Bundesrepublik Deutschland* (Opladen: Leske + Budrich, 1998), 366–69.

27 Fritz W. Scharpf, *Föderalismusreform: Kein Ausweg aus der Politikverflechtungsfalle?* (Frankfurt: Campus, 2009), 27–30.

into a "clause of necessity."²⁸ That this change would have far-reaching consequences for the reassertion of *Länder* autonomy, and for the balance of powers in German federalism more generally, was not recognized until the German Federal Constitutional Court handed down its 2004 verdict. As we already know, this happened when a more ambitious attempt of constitutional reform was already under way. Its eventual outcome, the disentanglement of some powers, did not fundamentally change the overall characteristics of German administrative federalism and its need for close cooperation.

By comparison, the insertion of a new Article 23 into the Basic Law by most accounts did not fundamentally alter the distribution of powers between the two levels of government. At the time, the Maastricht Treaty on European Union was seen as further eroding *Länder* autonomy, as the representation of German interests in the process of European integration fell to the federal government. Article 23 provided a differentiated set of participatory *Länder* rights in European legislation via the *Bundesrat*, but for the most part it only reasserted and intensified the already existing practice of close intergovernmental cooperation and negotiation.²⁹

Overall, the German experience with constitutional amendment allows a number of comparative observations.

First, even the German quest for constitutional clarity has limits. The revision of Article 72(2) from a "need" to a "necessity" clause obviously had the kind of unintended consequences for the entire concurrency field of powers that should have been avoided under the *Textänderungsgebot* of Article 72(1).

Second, in most other constitutions, changes to the distribution of powers are undertaken—if at all—with some specific policy goal in mind (e.g., national welfare) and then have a secondary effect of tilting the power balance, usually in a centralizing fashion. Germany stands out here in three respects: as a case in which recalibrating the balance of powers in the name of efficiency has been a primary objective of constitutional reform; as an unusual case of formal attempts to counteract the centralizing tendencies common to federal systems; and as an example of constitutional evolution contrary to the idea of "path dependency," where changes went against the prevailing norms of the system.

Third, all major reforms have been brought about by a level of cooperation going far beyond the formal requirement of bicameral two-thirds approval. The "joint tasks" were established by a grand coalition of the two major conservative and social democratic parties at the federal level, which together had received almost 90 per cent of the popular vote in the 1966 election. The same parties

28 Uwe Leonardy, "The Institutional Structures of German Federalism," in Charlie Jeffery (ed.), *Recasting German Federalism: The Legacies of Unification* (London: Pinter, 1999), 13.

29 See Hans J. Michelmann, "Germany and European Integration," in Matthias Zimmer (ed.), *Germany: Phoenix in Trouble?* (Edmonton: University of Alberta Press, 1997), 14–15.

dominated politics in all the *Länder*. The changes of the early 1990s were developed by a Joint Constitutional Commission of the *Bundestag* and *Bundesrat*, with the *Bundesrat*'s quota filled by the 16 *Ministerpräsidenten* (premiers) of the *Länder*. Those of 2006 were prepared by a similar commission—which also included (though without voting rights) key federal ministers, representatives of the *Länder* parliaments, representatives of municipal associations, and a number of political, economic, and constitutional experts. After the negotiations broke down, another grand coalition brought them to conclusion following the 2005 election.³⁰

Fourth, the reason for the success of these broad reform efforts—as compared to the failure of similar Canadian efforts such as the Meech Lake and Charlottetown Accords—does not lie solely in the one-step amendment procedure. Equally if not more important is a strongly interconnected national party system, as well as the fact that there are no deep regional fissures dividing the federation.

The EU: Maintaining Confederal Consent

As we have seen in earlier chapters, in several ways the EU is not a conventional federal system. In this case, it is because the EU's primary body of law is a series of treaties rather than a constitution, and because changes to these treaties, or the adoption of new ones, require the consent of all members. Over the half-century since its inception, the EU has nevertheless moved steadily toward federalism by adopting comprehensive and innovative mechanisms of cooperation in order to facilitate and speed up necessary or desirable treaty changes. Despite maintaining a rule of unanimity for constitutional or treaty changes, the EU has an impressive amendment record.

Acquis Communautaire

Since its inception, the EU has been almost continuously widened and deepened, from the original 6 member states to the current 28, and from a common market governed by intergovernmental agreement to an economic and monetary union that also includes cooperative strategies of foreign policy and internal security. Most economic and monetary matters are now governed under the ordinary legislative procedure (Article 289.1 TFEU), namely adoption by both Council and Parliament. As of November 2014, Council decisions have been made by the new double majority rule. Each step of widening and deepening requires an intergovernmental treaty. In the process of this widening and deepening, the EU has established a legal presence, a set of rights and obligations incumbent on its members, that is known as the *acquis communautaire*. This presence is based on the treaties and extended through the rulings and directives of the EU.

30 See Anton Hofmann, "Constitutional Negotiations in Cooperative Federalism: The Case of Germany," in Arthur Benz and Felix Knüpling (eds.), *Changing Federal Constitutions: Lessons from International Comparison* (Opladen: Barbara Budrich, 2012), 119–32.

Three types of treaties can be distinguished. Apart from the **accession treaties** regulating the entrance of new member states, there have been four **founding treaties**, setting up the original three communities (ECSC Treaty and Treaties of Rome) as well as establishing the European Union (Maastricht Treaty); and five **amending treaties** (Merger Treaty, SEA, Amsterdam, Nice, Lisbon), which modified governance under the existing framework of the founding treaties (see Box 10.3). With the exception of the Merger Treaty, which was repealed by the Treaty of Amsterdam, all these founding and amending treaties are still in operation and have been consolidated into the two bodies

Box 10.3 EU Treaties

a) Chronology of EU Treaties (by date of ratification)

- 1952 The original ECSC Treaty (European Coal and Steel Community).
- 1958 The original founding Treaties of Rome created the European Economic Community (EEC) and the European Atomic Energy Community (Euratom).
- 1967 The Merger Treaty created a single Commission and a single Council for the common governance of the three original communities. At this stage, the European Communities became known as the European Community.
- 1987 The SEA (*Single European Act*) required extensive economic policy harmonization for the completion of a single European market by 1992. It also contained procedural amendments and additions to all previous treaties.
- 1993 The Treaty on European Union or "Maastricht Treaty" established economic and monetary union. It also extended qualified majority voting in the Council and introduced the co-decision procedure (Council and Parliament) that would eventually apply to most legislative acts.
- 1999 The Treaty of Amsterdam increased the use of the co-decision procedure in anticipation of massive future membership enlargement, mostly from Eastern Europe. Repealing the Merger Treaty, it also consolidated and renumbered the two founding treaties on European Community (TEC) and European Union (TEU).
- 2003 The Treaty of Nice changed the composition of the Commission and replaced qualified majority with double majority voting in the Council in order to secure efficient governance for what was by now 25 member states.
- 2009 The Treaty of Lisbon adopted some of the key elements of the failed 2004 Constitutional Treaty. In particular, the Charter of Fundamental Rights of the European Union was adopted, the role of the European Parliament in European decision-making was strengthened further, the exercise of concurrent powers was placed under expanded procedural rules of subsidiarity, and the two founding treaties, TEU and TEC (the latter renamed in to TFEU, Treaty on the Functioning of the European Union), were consolidated and renumbered.

b) EU Treaties Currently in Force, 2015

Treaty of Lisbon
 TEU (consolidated version)
 TFEU (consolidated version)
 Euratom (consolidated version)
 Charter of Fundamental Rights of the European Union

of law currently governing the EU: the Treaty on European Union (TEU), and the Treaty on the Functioning of the European Union (TFEU).

Treaty Amendments

In terms of federalism, the mode of treaty change is intergovernmental agreement. Before 1985, such changes were prepared in committees and then formally adopted by the European heads of state or government. Since 1975, these summit meetings have been formalized and regularized as European Council meetings. Since 1985, however, so-called Intergovernmental Conferences (IGCs) already discussed in Chapter 9 have become the main instrument for initiating and orchestrating change.³¹

At the European Council meeting of 1985 in Milan, the European Commission under the new and activist leadership of Jacques Delors presented its white paper calling for completion of the single market and containing in its appendix approximately 300 proposals for economic policy harmonization. The idea was to convene an intergovernmental conference to prepare for what eventually became the *Single European Act*. Opposition came mainly from Britain, Greece, and Denmark. In an unprecedented move, the Italian Council President forced the issue by calling a vote, permitted under the Treaties but never used before. The IGC was established by a 7:3 vote in favour (there were only ten Member States at the time), and, with the eventual full cooperation of all members, the SEA was adopted two years later.

Similarly, the Maastricht Treaty was prepared by two IGCs, one on monetary union and one on political union. The treaties of Amsterdam and Nice were preceded by IGCs as well. Participation in these IGCs is normally a matter of the member states' foreign ministers, whose meetings are in turn prepared by a committee of their senior officials. However, given the importance of such fundamental treaty revisions as the SEA or the TEU, Europe's government leaders routinely take an active part.

The most recent IGC dealt with the fallout from the failed Constitutional Treaty and eventually led to the adoption of the Lisbon Treaty.³² It was preceded by six months of informal intergovernmental negotiations beginning in 2006; the member states' foreign ministers assisted by members of the European Parliament conducted it over a three-month period in 2007; negotiations were concluded at an informal European Council meeting; and the treaty was finally signed in Lisbon on, 13 December 2007. Speedy ratification was interrupted when the treaty was

31 Elizabeth Bomberg, John Peterson, and Richard Corbett, "Introduction," in *The European Union: How Does It Work?*, 3rd ed. (New York: Oxford University Press, 2012).

32 See Clive Church and David Phinnemore, "From the Constitutional Treaty to the Treaty of Lisbon and Beyond," in Michelle Cini and Nieves Pérez-Solórzano Borragán (eds.), *European Union Politics*, 4th ed. (Oxford: Oxford University Press, 2013), 47–55.

Box 10.4 Amending Provisions, Article 48 TEU

There is an ordinary and a simplified revision procedure. In both instances, member-state governments, the European Parliament or the European Commission can make proposals; before acting upon proposals, the European Council has to consult with the European Parliament and the Commission; final adoption requires member-state ratification.

Ordinary Revision Procedure for Matters Affecting Union Competences

- The Council (of Ministers) submits proposals to the European Council.
- The European Council decides by majority to convene a Convention composed of representatives of national parliaments, governments, European Parliament, and European Commission for the examination of the proposal.
- The Convention adopts by consensus a recommendation to an IGC.
- For minor amendments, the European Council may decide, by majority, and with consent of the European Parliament, to establish terms of reference for an IGC without a Convention.
- The IGC determines by consensus the amendments to be made.

Simplified Revision Procedure for Internal Union Policies and Actions (not increasing Union powers)

- The European Council adopts by consensus an amending decision.
- The European Council can also for certain matters and by consensus authorize a change of decision-making rules in the Council.

For full text see http://europa.eu/eu-law/decision-making/treaties/index_en.htm.

rejected at referendum in Ireland (the only member state requiring one). After some further concessions resulting in a second and affirmative Irish referendum, the Treaty of Lisbon came into force on 1 December 2009.

The Lisbon Treaty was a complicated package deal containing hundreds of amendments to the existing treaties in order to meet the approval of all member states. It also entered into force a differentiated set of formalized provisions for further treaty revisions transferred from the failed Constitutional Treaty (see Box 10.4). In essence, these provisions continue with the tradition of unanimous consent for treaty changes.

In comparison with amending procedures in conventional federal systems, these provisions also significantly extend the idea that constitutional change should be difficult. In their requirement for a combination of consultation and a two-step process of unanimous approval, by the European Council and through member-state ratification, they introduce a substantial degree of participatory involvement. While hardly a model for the established federations, they may indeed provide a blueprint for new types of treaty federalism in a globalizing world.

Imitations and Variations

As we have seen so far, the power to bring about constitutional change is typically vested in representative bodies acting on behalf of the people. The designers of some federal systems felt compelled to add a plebiscitarian option for added legitimacy in the case of particularly far-reaching reforms, even though this is not usually part of the regular amending process. In Canada, such an option was added to the Charlottetown Accord, which resulted in its rejection. In the case of the European Union, it is up to individual member states whether they want to tie the ratification of treaty changes to a popular referendum.

But in some federations, a national referendum is mandatory for all constitutional amendments. The requirement that the people themselves control changes to the original federal compact is not as unproblematic as it may seem. We briefly discuss two cases, Switzerland and Australia. In both federations, a double-majority requirement is built into the referendum process itself: a national majority and a majority in a majority of the cantons or states. An interesting variation is found in Spain, where constitutional rigidity at the national level is combined with a flexible and active process driven by the subnational level, as the autonomous communities have considerable leverage over changes to their statutory powers.

Switzerland

Until 1848, the Swiss Confederation had no amending procedure at all—a situation that was resolved by the *Sonderbund* war and the subsequent shift from confederal to federal government.³³ Modern Switzerland is now at rather the opposite extreme. With its uniquely strong tradition of direct democracy, Switzerland not only uses the referendum device, but also includes provision for its citizens to *initiate* a constitutional referendum. Any citizen, or group of citizens, can propose a specific constitutional amendment. If this initiative is supported by 100,000 signatures, parliament has two options. It can either put the question to a constitutional referendum as is, or it can make a counterproposal—in which case the voters have a choice.

As there are 20 full and 6 half cantons in Switzerland, and half cantons have only half a vote in referendum outcomes, the double-majority requirement means that a constitutional amendment can be blocked by a no vote in 11.5 cantons. Given the discrepancy in population size between cantons, this creates the potential for a considerable tension between the democratic principle of majoritarianism and the federal principle of regional representation. Switzerland's division into a majority of small and mostly rural cantons on the one hand, and a minority of large and urban cantons on the other, means that a constitutional amendment

33 Thomas Maissen, "The 1848 Conflicts and Their Significance in Swiss Historiography," in Michael Butler, Malcolm Pender, and Joy Charnley (eds.), *The Making of Modern Switzerland, 1848–1998: Between Continuity and Change* (Basingstoke, UK: Palgrave, 2000), 3–34.

can be approved by a large popular majority country-wide but ultimately rejected by opposing votes in a majority of cantons representing only a small fraction of the population—19.5 per cent in the most extreme case so far.³⁴

Swiss referendums thus can become a numbers game of plebiscitarian manipulation. Large and powerful interest organizations will concentrate their campaigning efforts on those cantons most likely to constitute a blocking minority. As Linder and Vatter remark, “The double-majority rule in direct democracy is an effective veto device.”³⁵ Nonetheless, parliament-initiated referendums have enjoyed a two-thirds success rate, while 90 per cent of citizen-initiated ones fail.³⁶ Referendums can also slow progress. The most notorious—if uniquely Swiss—example has been universal suffrage. Since 1919 voters rejected proposals to extend voting rights to women in numerous referendums at the federal and cantonal levels, and it was not until 1971 that universal suffrage was approved at the national level.³⁷

Australia

In Australia there is no provision for citizen initiation of referendums, but amendments to the constitution must be approved by voters in a referendum. The double-majority requirement of an overall national majority and a majority of voters in a majority of states appears to play a similarly conservative role to that in Switzerland. In a federation of only six states, approval in a majority of four states would not be successful if collectively they represented less than half of the total electorate. Neither would approval in three of the most populated states representing more than half of the electorate. In addition, the numbers create a *de facto* super-majority requirement: the minimum margin in a group of six is a two-thirds majority. Of the 36 proposals defeated in referendum, 5 were defeated by the double-majority requirement—including one that achieved a convincing 62-per-cent support nationally but had its majorities concentrated in three states.

Only 8 of 44 referendum questions have succeeded in a century since Federation. As in Switzerland, popular consultation is often associated with

34 See Wolf Linder, *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies*, 3rd ed. (Basingstoke, UK: Palgrave Macmillan, 2010), 81–85.

35 Wolf Linder and Adrian Vatter, “Institutions and Outcomes of Swiss Federalism: The Role of the Cantons in Swiss Politics,” *West European Politics* 24.2 (2001): 98.

36 Linder and Vatter, “Institutions and Outcomes,” 97.

37 It took another 20 years before all cantons followed suit. The last one, Appenzell-Innerrhoden, had to be forced to do so by a Federal Supreme Court decision. On federalism and female suffrage in Switzerland (and the US), see Lee Ann Banaszak, *Why Movements Succeed or Fail: Opportunity, Culture, and the Struggle for Woman Suffrage* (Princeton, NJ: Princeton University Press, 1996).

constitutional conservatism. On a number of occasions, Australian governments have been rebuffed by the people in their attempt to effect change to the operation of the Senate or the division of powers. However, the people have supported important changes on some occasions—notably to endorse a national welfare state in 1946 and to grant the Commonwealth power to legislate for Aborigines in 1967—and it could be argued that the high failure rate merely reflects the fact that the voters were wise and the proposals ill considered.³⁸ It also reflects the lopsided design of the amendment process: with the Commonwealth (and indeed the prime minister) enjoying exclusive control of the initiation of referendums, there has been a pronounced tendency for propositions to focus on an expansion of Commonwealth powers.³⁹

However, critics argue that in general the referendum is a poor technique for resolving constitutional issues, since it presents an artificially polarized yes/no choice with no opportunity for negotiation, compromise, or the practice of deliberative democracy.⁴⁰ A case in point is the 1992 Charlottetown Accord referendum in Canada. While Canada does not use constitutional referendums, as in any other country the government may decide to link the passage of a particular bill to direct popular approval. The constitutional package of the Charlottetown Accord was negotiated as an exercise in executive federalism in a last attempt at bringing Québec into the constitutional fold. It included various compromises with the other provinces in return for their support. Despite extensive public hearings, the people rejected the Accord. The referendum procedure obviously was not able to accomplish what conventional intergovernmentalism had failed to achieve previously: trust in the legitimacy of the political process.

Spain

We have noted the contrast between those federations that seem to epitomize constitutional rigidity and those where amendment seems to be the bread and butter of politics. No example exemplifies rigidity as clearly as the Spanish Constitution, which has yet to be amended in its more than 35 years of operation. Moreover, this record would not seem to reflect a lack of need or demand—not least of all

38 Brian Galligan, "The Republic Referendum: A Defence of Popular Sense," *Quadrant* 43.10 (1999): 46–52; and Brian Galligan, "Amending Constitutions through the Referendum Device," in Matthew Mendelsohn and Andrew Parkin (eds.), *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (Basingstoke, UK: Palgrave, 2001), 109–24.

39 Sarah Murray, "State Initiation of Section 128 Referenda," in Paul Kildea, Andrew Lynch, and George Williams (eds.), *Tomorrow's Federation: Reforming Australian Government* (Leichhardt, NSW: Federation Press, 2012): 332–49.

40 Mueller, "On Amending Constitutions," 388; Simone Chambers, "Constitutional Referendums and Democratic Deliberation," in Matthew Mendelsohn and Andrew Parkin (eds.), *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (Basingstoke, UK: Palgrave, 2001), 231–55.

given the manifest deficiencies of its second chamber.⁴¹ Why has amendment not occurred? Explanation would seem to lie partly in the high threshold required by the amending procedure, but at least as important is Spain's political culture of constitutional stability, with "stability being wrongly understood as the untouchability of constitutions."⁴² On the face of it, this imperviousness to formal change is all the more curious given that the new democratic Spanish political system was deliberately created in 1978 as an open-ended work in progress, with its devolved features expected to take shape over time in a process of federalization.

The resolution of this paradox lies in the unique process of Spanish federalization itself (see Chapter 6). Instead of agreeing to a particular constitutional division of powers *a priori*, Spain's 17 autonomous communities had to negotiate individual Statutes of Autonomy with the central government. And since the autonomous communities obviously can also demand changes to these statutes, the Spanish system created a distinctive channel of *de facto* constitutional amendment. There is a catch, of course: changes to individual Statutes of Autonomy must be approved by parliament. However, such approval requires only an ordinary majority and thus faces none of the special hurdles that hinder amendment of the national constitution. Even so, demands for changes seen as too provocative—notably those from the Basque Country and Catalonia—have either been rejected or substantially watered down. In the Catalan case, this led to a standoff that was eventually resolved by the Constitutional Court in 2010.⁴³

Extreme Constitutional Amendment: Secession

An ultimate form of constitutional change is secession. As we discussed in Chapter 2, secession poses a cruel challenge to democratic federal states, which tend to be predicated on the assumption that the original compact was one of "perpetual" or "indissoluble" union. Furthermore, there is a real danger, as Wheare noted, that to acknowledge a right to secession is to invite trouble—particularly in the form of strategic or blackmailing actions.⁴⁴ In an age, though, where legitimacy is based on the democratic right to self-determination, an

41 Carles Viver, "Spain's Constitution and Statutes of Autonomy: Explaining the Evolution of Political Decentralization," in Michael Burgess and G. Alan Tarr (eds.), *Constitutional Dynamics in Federal Systems: Sub-National Perspectives* (Montreal: McGill-Queen's University Press, 2012), 219–260.

42 Viver, "Spain's Constitution," 220.

43 Judgement no. 31/2010. See César Colino and José A. Olmeda, "The Limits of Flexibility for Constitutional Change and the Uses of Sub-National Constitutional Space: The Case of Spain," in Arthur Benz and Felix Knüpling (eds.), *Changing Federal Constitutions: Lessons from International Comparison* (Opladen: Barbara Budrich, 2012), 191–209.

44 K.C. Wheare, *Federal Government*, 4th ed. (Oxford: Oxford University Press, 1963), 87; also see Cass R. Sunstein, "Constitutionalism and Secession," *University of Chicago Law Review* 58.2 (1991): 633–70.

outright denial of secession is difficult to justify. But how can constitutional federations think the unthinkable?

Most don't, by entirely omitting the issue from their constitutions. Some, such as Australia or Spain, go even a step further by expressly proclaiming "indissoluble" unity. Western Australia's vote to secede from the Commonwealth in 1933 was treated as invalid by both the Australian and British governments (though it led to important concessions, as noted in Chapter 7).⁴⁵ The Spanish Constitutional Court declared Catalonia's non-binding statehood referendum of November 2014 unconstitutional for the same reason. That referendum went ahead, nonetheless, couched as a "public consultation," and received a high majority of votes cast. Secession remains a salient issue in a number of "holding together" federations (see Chapter 12), and guidance may come from the two cases where federal systems have expressly addressed the issue in recent times. In Canada, the ongoing threat of Québec separatism has led to an effort at providing "clarity" surrounding the process of secession, even when the constitution is silent on the issue. And in the European Union, member-state withdrawal has been recognized for the first time in a democratic federal system as a formal constitutional procedure under the Treaty of Lisbon.

The American Precedent

The question of secession in federal systems is forever tainted not only by bitter experience, but most importantly by its close association with a morally indefensible cause. The murderous American Civil War of the 1860s was precipitated when the slave-holding South seceded and formed the Confederacy. In the debates leading up to that conflict, the Americans were forced to confront the question of whether confederal liberties had been carried over into the new union or whether it was now indeed a "perpetual union." The secessionist view, as foreshadowed by John Taylor and expounded by John C. Calhoun, insisted that the constitution be interpreted according to "original intent"; that it operated on the basis of a **concurrent majority** whereby national majorities could not steamroller local majorities; and that the union had been created through a revocable **compact** between the states.⁴⁶ Quite deliberately, then, the procedure for secession replicated the original procedure for ratification—with the

45 See Gregory Craven, *Secession: The Ultimate States Right* (Carlton: Melbourne University Press, 1986).

46 John Taylor, *Construction Construed and the Constitution Vindicated* (Richmond, VA: 1820), and *New Views of the Constitution of the United States* (Washington, DC: 1823); John C. Calhoun, *Disquisition on Government* (1840; Indianapolis: Bobbs-Merrill Educational, 1953). Also see Murray Forsyth, "John C. Calhoun: Federalism, Constitutionalism, and Democracy," in Michael Burgess and Alain-G. Gagnon (eds.), *Federal Democracies* (Abingdon, UK: Routledge, 2010), 64–85.

Confederate states electing constitutional conventions to decide the issue.⁴⁷ A thoroughly worked-out philosophical position provided the necessary underpinnings for drastic action, but in the end it was military force, not intellectual reason, that decided the issue. Victory in the Civil War allowed the Supreme Court to rule that the Confederate governments had no legal basis, since “the Constitution, in all its provisions, looks to an indestructible union, composed of indestructible States.”⁴⁸

The philosophical incompatibility between principles of liberal democracy on the one hand, and practices of forcible inclusion on the other, has provoked considerable recent attempts to build a normative “theory of secession.”⁴⁹ A right of secession is strongly implied by the liberal principle of national self-determination: a people have the right to ascribe to themselves a national identity and to govern themselves on that basis.⁵⁰ If it is a moral right, though, it follows that it must be conducted morally. Secession must follow procedures that protect the national majority against blackmail (i.e., reduce the scope for “strategic bargaining”), ensure that the democratic basis is indeed there, and protect minorities who may be part of the collateral damage. One procedural element might be a requirement for some sort of referendum super majority.⁵¹

Canada

The Canadian case is particularly interesting because, unlike quite a number of other cases resulting in federal failure—including, more recently, Pakistan (1971), Czechoslovakia (2002), and Yugoslavia (1991–95)—the break-up has been avoided to date.⁵² As we noted in Chapter 3, Canada shares with these and other cases a number of characteristics that have been identified as generally problematic for the stability of federal systems. One is its bi-communal nature, which essentially divides the country into English- and French-speaking parts.

47 Forrest McDonald, *States' Rights and the Union: Imperium in Imperio, 1776–1876* (Lawrence: University Press of Kansas, 2000), 190.

48 *The State of Texas v White et al.*, 74 U.S. 700 (1869).

49 For example: Allen Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder, CO: Westview Press, 1991); Percy B. Lehning (ed.), *Theories of Secession* (London: Routledge, 1998); Margaret Moore (ed.), *National Self-Determination and Secession* (New York: Oxford University Press, 1998).

50 For example: Kai Nielsen, “Liberal Nationalism and Secession,” in Margaret Moore (ed.), *National Self-Determination and Secession* (New York: Oxford University Press, 1998), 123–33.

51 See Buchanan, *Secession*; and Daryl J. Glaser, “The Right to Secession: An Antisecessionist Defence,” *Political Studies* 51.2 (2003): 369–86.

52 Equally interesting is the case of Belgium, which, however, moved from a unitary to a federal constitution in 1993 in order to avoid break-up.

The other and related characteristic is asymmetry, the uneven distribution of population and allocation of resources and opportunity structures across the federation.

Twice—first in 1980 and then in 1995—the primarily francophone province of Québec held a referendum on separation. In each case the question asked was widely considered (at least in English Canada) to be deliberately imprecise for the strategic reason of garnering as much support as possible. This imprecision was reflected in the separatist party's proposal for "*Souveraineté-Association*" (sovereignty-association). Both times the referendum failed—though it did so very narrowly the second time around. The imprecision was twofold. First, Quebecers were not asked directly if they wanted to separate from the rest of Canada; instead, they were asked if they wanted to give their provincial government a mandate to move toward such a separation. Second, the exact nature of the relationship with the rest of Canada after the act of separation was left unclear. An expectation was fostered that some form of economic union, including the continuation of a shared currency, would soften the blow. It was also unclear whether Québec could in fact secede legitimately as an act of national self-determination under international law, and whether it could do so unilaterally without negotiating terms and conditions (e.g., dividing up the national debt) with the rest of the country.

In the aftermath of the second referendum, then, the federal government initiated a process of legal and legislative clarification of the conditions for legitimate secession. It first asked the Supreme Court of Canada for a constitutional opinion in a reference case (see Chapter 11), and then, on the basis of that opinion, it introduced and passed legislative terms and conditions, the *Clarity Act*, outlining the conditions under which it was willing to negotiate a legitimate secession of Québec.

The Supreme Court of Canada was asked, first, whether the unilateral secession of Québec was constitutionally possible; second, whether such a right of unilateral secession could be invoked under the international law of self-determination; and third, whether international law would take precedence over domestic law. In its decision of 20 August 1998, the Supreme Court held that secession of a province "under the Constitution" could not be achieved unilaterally and without negotiation with the rest of the country; that Québec could not invoke an international right of self-determination because this was possible only when a nation or people was denied a meaningful exercise of its political rights; and that the issue of the precedence of international over domestic law therefore did not have to be considered.

In the context of federalism, it is the Court's answer to the first question that warrants closer examination. It held that the quest for separation was legitimate in a democracy if it was based on a clear majority in favour of a clear proposition. As we have noted, it is difficult to reconcile an absolute prohibition on secession with

the principles of liberal democratic self-determination. But, by the same token, if secession is to be taken seriously in a democracy, it must be indubitably democratic. The Court went on to state that democracy means more than simple majority rule because democracy exists in the larger context of other constitutional values. In a federal system, these include respect for historical ties of interdependence and an obligation to engage in discussions about constitutional change. As a consequence, therefore, the Court concluded that legitimate secession required "principled negotiation with other participants in Confederation within the existing constitutional framework."⁵³

The remarkable character of the Court's decision lies in its affirmation of federalism as a process of negotiation rather than merely as a legal framework of rights and obligations. Furthermore, there is a clear recognition of federalism as a system with shared sovereignty and governance that outweighs the democratic principle of majority rule.

As intended all along, the federal government responded with its *Clarity Act* in December 1999.⁵⁴ Reiterating the Supreme Court's opinion that a fully democratic expression of the will to secede could only be the result of a referendum "free of ambiguity both in terms of the question asked and in terms of the support it achieves,"⁵⁵ the *Clarity Act* set out the conditions under which the Canadian government would enter into negotiations with a province about secession.

To begin, Parliament would consider, within a specified period of time, both whether the question was clear and whether the result of the referendum was clear. To this effect, the *Clarity Act* specified a number of conditions. The question must allow clear expression of a popular will to secede in order to become an independent state. Neither questions asking merely for a mandate to negotiate secession, nor questions envisaging a range of options other than outright secession will be accepted as clear. With regard to the clarity of outcome, Parliament is to take into consideration both the actual result of votes cast and the rate of participation among eligible voters. The *Clarity Act* further specified that secession could be accomplished legitimately only by means of a constitutional amendment—which would entail meeting the requirements established by the *Constitution Act 1982*. And it firmly stated that such a constitutional amendment

53 Supreme Court of Canada, *Reference re Secession of Quebec* (1998) 2 SCR 217. Also see Stéphane Dion, "The Supreme Court's Reference on Unilateral Secession: A Turning Point in Canadian History," in Ronald Beiner and Wayne Norman (eds.), *Canadian Political Philosophy: Contemporary Reflections* (Don Mills, ON: Oxford University Press, 2001), 311–17.

54 Passed as *Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*—29 June 2000.

55 *Reference re Secession of Quebec*.

would not be introduced unless such negotiations had settled a number of issues, including the division of assets and liabilities, territorial boundary changes, and Aboriginal and other minority rights.

The government also followed the lead of the Court and abstained from making numerically explicit what would be considered a “clear majority”—a peculiar omission since it certainly would appear in line with federalist practice to specify some sort of super or compounded majority rule. This led to speculation as to whether the *Clarity Act*’s real objective was simply to raise the procedural threshold to whatever level would be just beyond the reach of Québec’s separatist aspirations. Implicitly it would seem that the requirement for a “clear majority” is a requirement for an absolute rather than a simple majority, that is, a majority of all those eligible to vote. Even without pressing for something higher than 50 per cent plus 1, this raises the bar considerably.

Because it outlined operational principles rather than hard and precise conditions, the *Clarity Act* was generally criticized as vague. Also, as simply an Act of Parliament or “ordinary law,” its insistence on a constitutional amendment in particular is not itself anchored in the constitution. But, together with the constitutional reference, it has been recognized internationally as a major contribution to the formulation of a general framework for legitimate secession in a world with a growing number of volatile minority situations and secessionist threats.

The European Union

By comparison, the stipulations for member-state withdrawal from the EU under the Lisbon Treaty are clear, concise, and precise (see Box 10.5).

Judging by some of these formulations, it would appear that the Europeans had taken notice of the Canadian precedent. Yet there are obvious major differences. In particular, there are no conditions about how member states may decide to withdraw; they are treated as sovereign under their own constitutions in this regard. For other federal systems with separatist tensions, such as Spain,

Box 10.5 Member State Withdrawal under Article 50 TEU

1. Any member may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. The member state notifies the European Council of its intention. It negotiates conditions of withdrawal and the future relationship with the Union with the Council. The Council concludes the process by qualified majority and with the consent of the European Parliament.
3. The withdrawing member state shall not participate in European Council or Council discussions.

Belgium, or India, such confederal largesse is hardly to be expected. But the European withdrawal provisions nevertheless stand as the first constitutionalized expression of a right to secede.⁵⁶ They thus invite one to rethink the notion of “perpetual union” more generally, at a time when a static world of independent states is being replaced by a much more fluid world of transborder interdependence, regional integration, and global trade rules.

⁵⁶ Such a right was previously acknowledged only in the old constitution of the Soviet Union. But under conditions of a one-party communist dictatorship, it had no real significance.

11 Judicial Review

FEDERAL SYSTEMS REQUIRE A CONSTITUTIONAL FRAMEWORK that is superior to the normal processes of politics and law-making, demarcating the relationship between two contending levels of government. Without such a framework, the idea of shared sovereignty would not be viable. Constitutions, in turn, require interpretation; there must be not only a set of rules binding the players, but also an umpire to interpret and apply those rules. In the absence of a suitable alternative, that umpire has been a judicial one: a final court providing authoritative determination of constitutional meaning and constitutionality. The development of federalism has thus simultaneously meant the development of **judicial review**, which in turn has had a significant impact on the development of some of the most important federal systems. In Dicey's view, this imbued federal systems with "legalism": "Federalism . . . means legalism—the predominance of the judiciary in the constitution—the prevalence of a spirit of legality among the people."¹

The fact that arm's-length constitutional interpretation is such an important component of federal systems raises a number of analytical questions.

First of all, how did judicial review arise, and how do we deal with the fact that constitutions have become "judicialized" even though they are fundamentally different from other forms of law? As political agreements, their interpretation is inescapably a political matter, and the final authority of courts over constitutional politics has remained a source of contention.

Second, why do some federations rely so much more on judicial resolution of jurisdictional issues than others? Dicey's legalism has not been universal: judicial review has always been a far more prominent feature of English-speaking federalism than of European.

Third, to what extent should the courts be credited with (or blamed for) determining the way in which federal systems have evolved over the years? Some commentators—usually critics—have attributed decisive importance to judicial decisions in shaping federations. Others have argued that the courts over time respond to underlying social and economic realities and play no shaping role over the medium to longer term. William Riker, for instance, dismissed the "importance of utterances by judges" as "vastly overestimated" and argued that societies get the outcomes they demand.²

1 A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1915), 170.

2 William H. Riker, "Federalism," in Fred I. Greenstein and Nelson H. Polsby (eds.), *Handbook of Political Science. Volume 5: Governmental Institutions and Processes* (Reading, MA: Addison-Wesley, 1975), 110.

And fourth, if the courts have played an important role in shaping federal systems, have they done so in any particular direction? For some again, the answer is no: courts have dexterously and fairly balanced national and subnational interests, either in individual decisions or in the longer-term effect of a series of decisions. For others the answer is yes: judicial interpretation has been a more insidiously centralizing force in the history of federal systems.

The Role of the Judiciary in a Federal System

Early federal constitutions made little provision for the problem of constitutional interpretation. Unless they made explicit provision to the contrary, though, it is a role that has been inevitably (but not automatically) assumed by the courts. In doing so, the judiciary revolutionized its role in government, a revolution that went hand in hand with the rise of constitutionalism. Prior to the development of American constitutionalism, the judiciary played a largely subordinate role, interpreting and applying but not questioning the law. With the adoption of a federal constitution in the United States came the invitation to exercise a power of judicial review: the practice by which an independent judiciary invalidates disputed legislative acts whenever it considers those acts to be in conflict with the constitution. Judicial review occurs when the courts are given or establish for themselves a mandate to be the authoritative source of constitutional interpretation. It makes the courts the “guardians of the constitution” and thus on the face of it gives them enormous power and responsibility in the operation of a federal system.

The Power of the Courts

Montesquieu characterized the power of the judiciary as “in some fashion, null,”³ and Alexander Hamilton followed suit when he reassured readers in *Federalist* 78 that the judiciary would be the “least dangerous” of the three branches of government. The courts have neither will nor force, Hamilton argued. Unlike the legislature, they do not *make* laws or hold the power of the purse, and unlike the executive, they are without the means to *enforce* the law. Early constitutional thinkers, in other words, did not foresee the power that supreme courts would wield by virtue of their authority to interpret often-ambiguous constitutional meanings in societies where the rule of law had become firmly established. As one American justice famously said, “We are under a Constitution, but the Constitution is what the judges say it is.”⁴ Later constitutional designers, such as those putting together the German Constitution of 1949, anticipated this reality

3 Montesquieu, *The Spirit of the Laws* (Cambridge: Cambridge University Press, 1989), 160.

4 Chief Justice Hughes, quoted in Merlo J. Pusey, *Charles Evan Hughes* (New York: Macmillan, 1951), 204.

by specifying the court's tasks in far more extensive detail. Supreme courts have not overshadowed the political process in all federations.

Two particular reasons account for the powerful impact of judicial review on the trajectory of federal systems. First, supreme or constitutional courts have a unique ability to reverse previous judgements and introduce a new line or direction of interpretation. While strongly influenced by previous decisions, final courts are not bound by those decisions. Supreme courts in the common-law federations as a rule respect *stare decisis*, or "precedent," but are not captive to it. In civil-law federations, such as Germany, the rule is alien.⁵ In both instances, however, final courts may wander off the straight and narrow for the simple reason that there is no higher court to overrule them. In consequence, judicial review in federal systems tends to occur in quite identifiable phases as the court changes its complexion with new appointments and switches from one prevailing view to another over time.

This brings us to the second reason for the power of judicial review: there is little further recourse. "There is an awful finality about judicial decisions, for there is no easy legislative override and constitutional amendments are almost impossible."⁶ Aware of the tension between legislative and judicial power, judges sometimes expressly play the ball back to politics. In its 2011 *Securities* reference, for instance, the Supreme Court of Canada ruled unconstitutional the federal government's intention to create a national securities regulator.⁷ At the same time, however, the Court declared that it had no place in deciding whether such a national regulator was a good idea, instead admonishing the intergovernmental combatants to find a "coordinated" political solution (see below in this chapter).

Occasionally—but only very occasionally—legislators have also responded to court rulings with constitutional amendment. In earlier American constitutional history, for instance, the Sixteenth Amendment of 1913 granting full powers of income tax to Congress was a direct response to a ruling by the Supreme Court striking down the federal income tax as unconstitutional.⁸ In Canada, the 1940 amendment granting the federal government exclusive jurisdiction over unemployment insurance was a response to the judicial invalidation of parliament's *Employment and Social Insurance Act* of 1935. And more recently in Germany, the reform of concurrent powers under Article 72 of the Basic Law was a response

5 On the latter, see Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd ed. (Durham, NC: Duke University Press, 2012), Chap. 2.

6 John T. Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2002), 308.

7 *Reference re Securities Act* (2011) 3 SCR 837.

8 *Pollock v. Farmers' Loan and Trust Co.* 157 U.S. 429 (1895).

to the Federal Constitutional Court's restrictive ruling on the "clause of need," discussed in Chapter 6.

Judicial Safeguards of Federalism?

This unique control that the judiciary exercises over the constitutional rules of a federation strongly implies that the courts serve as the essential safeguard, watchfully preserving the integrity and balance of the federal system. Should either level of government exceed its assigned authority or abuse its power, the courts will declare against it and bring the system back into balance. Whether the courts should really be expected to function as umpire of the system, whether they can—or do—function in that way, remains the subject of debate. It has been argued, for instance, that too much has been expected of the US Supreme Court in that regard and really it is the political safeguards, not the judicial safeguards, upon which the system must depend.⁹ This view is strengthened by widespread observation that courts cannot stand for long against prevailing political norms. Despite a strong tradition of judicial review in India, for instance, the Supreme Court began to play an active role in defending federalism from strong unitarist tendencies only once the Congress Party's monopoly on power had been broken.¹⁰ Nonetheless, in the United States, a strong counterargument has been made that the Court's umpire role is not only implicit in the design of the constitution, but crucial to its functioning.¹¹

Whatever importance one might attach to the role of final courts as judicial safeguards in theory, there is evidence that in practice they have not been very effective in maintaining the originally intended balance of powers. There has been a general trend of centralization in most of the classical federations, and judicial review has for the most part sanctioned or even facilitated it. One way to see this is Wheare's suggestion that the courts have supplied federal systems with the flexibility and adaptability that in many cases their constitutional amending procedures so conspicuously lack.¹² However, they may have done so with excessive willingness: "constitutional review by the highest courts in

9 See Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," *Columbia Law Review* 54.4 (1954): 543–60; Larry D. Kramer, "Putting the Politics Back into the Political Safeguards of Federalism," *Columbia Law Review* 100.1 (2000): 215–93.

10 Rekha Saxena and Mahendra P. Singh, "The Role of the Federal Judiciary in Union–State Relations in India," in Jan Erk and Wilfried Swenden (eds.), *New Directions in Federalism Studies* (London: Routledge, 2010), 50–67.

11 See John O. McGinnis and Ilya Somin, "Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System," *Northwestern University Law Review* 99.1 (2004): 89–130.

12 K.C. Wheare, *Federal Government*, 4th ed. (Oxford: Oxford University Press, 1963), 215.

federal systems has been a principal device of centralized policymaking.”¹³ Some commentators go further: “There appear to be no exceptions to the centralist theory of the judicial function.”¹⁴ According to this argument, the centralizing impact of supreme courts is institutionally determined. Established, appointed, and even possibly influenced by central governments, they will give judicial underpinning to a nationally oriented vision. As we will see, this particular view would seem to apply more to specific periods than to the overall record of judicial review. Judicial centralization accompanied periods of nation building and modernization with widespread support for the creation of national programs. More recently, and at least in some federations, there have been calls for, or even reforms toward, decentralization—and the courts have supported these.

But the question remains: how “federally” are supreme courts constituted? In other words, are their appointment and rules controlled by the central government alone, or, more consistent with the federal spirit, is control shared with the constituent units? Generally, as was noted some years ago, “appointment has been left solely in the hands of Centre authorities”—an arrangement scarcely consistent with the idea of supreme courts as neutral arbiters.¹⁵ At least in the case of Germany, however, this is true only in a technical sense. Half of the German Federal Constitutional Court is appointed by the *Bundestag*; the other half, meanwhile, is appointed by the *Bundesrat* and therefore by the delegates of the *Länder* governments. Another exception was Canada during its formative years, when the Judicial Committee of the Privy Council (JCPC) in London exercised the judicial review function; the JCPC’s institutional allegiance was to the British Empire, not to the Government of Canada, and its composition was controlled entirely by the British government.¹⁶

The Process of Judicial Review

Given that the judiciary has developed a far more important role than was originally envisaged, it is not surprising that a great deal has come to hinge on how the courts go about the task of construing the wording of constitutions, what methods and assumptions they use in sorting out ambiguities and applying general precepts to concrete cases, and whether there have been identifiable tendencies or biases in judicial review.

13 Martin Shapiro, *Courts: A Comparative Political Analysis* (Chicago: University of Chicago Press, 1981), 55.

14 André Bzdera, “Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review,” *Canadian Journal of Political Science* 26.1 (1993): 29.

15 Geoffrey Sawer, *Modern Federalism* (London: C.A. Watts & Co., 1969), 156.

16 See Jacqueline D. Krikorian, “British Imperial Politics and Judicial Independence: The Judicial Committee’s Decision in the Canadian Case *Nadan v. The King*,” *Canadian Journal of Political Science* 33.2 (2000): 291–332.

Judgements and Opinions

All final courts of judicial review are composed of several judges, ranging in number from the seven members of the High Court of Australia, to the nine members of the US and Canadian Supreme Courts, and to the now-28 of the European Court of Justice (one for each EU member state).¹⁷ This means that the judgement in any case is the outcome of several opinions that may well be quite diverse. It is quite possible, then, that judicial decisions are carried by a narrow majority, with strong and substantial dissent from other members of the bench. And indeed, while decisions are sometimes unanimous, cases may also be decided by single-vote majorities. To confuse the issue further, individual judges may give differing reasons for supporting the same general conclusion. And if that were not enough, opinions may include not only the *ratio decidendi*, the main reasoning for the decision, but also *obiter dicta*, further observations on the matter. Both *ratio* and *obiter* may be drawn upon in later judgements.

Another question is whether or not dissenting opinions are released together with the court's decision or majority opinion. There are good reasons for either option. The release of dissent may contribute to a broader and more open jurisprudence—dissenting views may provide important reasoning for revised interpretations down the track, although they do not create precedent. Meanwhile, the suppression of dissent may give decisions a more powerful impact as the court speaks with one rather than many voices. The supreme courts of the United States and Canada are among those releasing dissenting opinions. Other final courts conceal their diversity of views by issuing only a single, anonymous collective decision—as do the main constitutional courts in Europe today.

Decisions and Advice

In most instances, the courts render decisions on the basis of litigation that appears before them. That is to say, they pass judgement on a specific constitutional question arising from the application of an existing law to a specific situation. Courts are entirely reactive; they cannot initiate consideration of matters. Nor, generally, can their opinions be canvassed in advance of actions. Quite deliberately, courts typically do not dispense advice. Significant exceptions to this do, however, exist. As we saw with the *Secession Reference* and *Clarity Act* in the previous chapter, the Canadian Supreme Court is required by statute to hear **reference cases** when asked by federal or provincial governments for an advisory opinion on some constitutional matter prior to intended legislation. A similar and constitutional obligation exists for the German Federal Constitutional Court under the label of **abstract norm control**, the examination of the constitutionality of federal or *Länder* laws unrelated to a specific case of litigation.

¹⁷ Though large courts such as the ECJ hear cases in smaller chambers.

While the distinction between case decisions and advisory judgements applies only to the practice of judicial review in some countries, all final courts have to bear in mind another distinction, that between constitutional law and constitutional convention. The nature of constitutions as more than law is reflected in the importance of the practices and understandings that inevitably constitute a crucial component of the framework of rules under which a political system operates. Courts may provide interpretations of what those conventions might be and make them part of the rationale for a particular judgement; however, by its nature convention itself lies outside the boundaries of justiciability.

Interpreting the Constitution

There is no self-evidently correct or appropriate way to interpret a constitution, and there is certainly no agreed-upon way. One can identify a number of quite different approaches that courts take to constitutional interpretation,¹⁸ some with radically different implications. The first is the **original intent** or historical approach: interpret the constitution as meaning what we think its authors intended it to mean. This approach has the virtue of staying—or at least attempting to stay—true to the constitution as a founding agreement. However, there are a number of “perils of originalism.”¹⁹ These include disputes about what that original intent was, questions about the extent to which current generations should be bound by the decisions of previous generations, and practical concerns about anachronistic constraints limiting the ability of governments to cope with new circumstances.

Similar in implication is the approach that seeks to interpret any particular section of the constitution in line with the spirit or structure of the overall document. If the document means to create a balanced federation, then the court must be mindful of that in defining the limits of any particular grant of power.

Diametrically opposed to these intentionalist philosophies of interpretation are what we might call the textual and the practical approaches. The textual or **literalist** approach argues that the constitution must be expected to speak for itself. Meaning cannot be imputed, and it was up to the founders to give their intentions clear and effective expression: “There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.”²⁰ If this results in unpopular outcomes, then it is up to the people and their legislatures

18 See Philip Bobbitt, *Constitutional Interpretation* (Oxford: Blackwell, 1991).

19 Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Vintage, 1997), 3–22.

20 Or so it was insisted by Sir Owen Dixon at his swearing-in as Chief Justice of the High Court of Australia in the *Commonwealth Law Reports* 85 (1952): xiv.

to make the desired corrections, not the courts.²¹ The appeal of this approach is that it sidesteps difficult questions about intention and seems to accord special respect to the express constitutional bargain. However, is there any such thing as a purely “legal” interpretation of a constitution? Its invocation may simply be a smokescreen for underlying preconceptions of the judges²² and the claim to an objective neutrality “preposterous.”²³

Finally, there is the practical or **progressive** approach. Like the original intent approach, it looks outside the constitution for guidance. However, instead of looking backward to original intentions, it looks forward to current needs: the constitution must be regarded as a “living tree” adapting and branching out to fit its changing circumstances.²⁴ While adapting the constitution to current needs may sound the most reasonable approach, it is by no means unproblematic or uncontested. Such “activist” interpretation of the constitution places the judiciary at the edge of moderate judicial review and at risk of usurping the legislative function.

The United States: Invention and Limits of Judicial Review

Judicial interpretation of the US Constitution has revolved around a small number of key clauses in the list of powers assigned to Congress. We recall from Chapter 6 that the US division of powers followed the single exhaustive list approach, with plenary residual power left to the states, as was made explicit in the Tenth Amendment. Moreover, the powers assigned to Congress were few and chiefly concerned military and diplomatic matters. The sweeping centralization of American federalism that we have noted in earlier chapters was sanctioned by the Court in large part on the basis of Congress’s power to “regulate commerce . . . among the several states” and to provide for the “general welfare.” In addition, the power to “make all laws necessary-and-proper for carrying into execution the foregoing powers” has been used to sanction a wide interpretation of the enumerated powers, while the supremacy clause has been used to elbow state laws aside when Congress has decided to legislate (so-called pre-emption).

21 As Justice Isaacs asserted, writing for the majority in the High Court of Australia judgement in the *Engineers’ case*, *Amalgamated Society of Engineers v. Adelaide Steamship* (1920) 28 CLR 129.

22 Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (St Lucia: University of Queensland Press, 1987), 251 and *passim*.

23 Alan C. Cairns, “The Judicial Committee and Its Critics,” *Canadian Journal of Political Science* 4.3 (1971): 336.

24 The “living tree” metaphor was used by Lord Sankey of the JCPC in *Edwards v. Attorney-General of Canada* (1930) AC 124.

Among the questions at issue have been how widely the commerce net can be cast; where the line between commerce *among* the states and commerce *within* a state should be drawn; and what constitutes necessary and proper. Interpretation has been key to national policy-making in areas already under the authority of the federal government but left to the states when the constitution was composed. And it has also been crucial to extending national jurisdiction over issues—such as environmental protection—scarcely imagined in the 1780s.

Origins of Judicial Review

In pioneering the codified constitution and inventing modern federalism, the Americans also pioneered judicial review. After a decade of constitutional experimentation and learning at the state level, the Americans drafted and ratified their second constitution in a context where judicial review was quite novel, if not still alien—both to the influential concept of separation of powers as articulated by Montesquieu (since it meant that the judicial branch intruded upon the legislative branch) and to their native ideas of the paramount status of the legislature as the voice of the people.²⁵

In Article III, the US Constitution called for the creation of “one Supreme Court” without, however, expressly assigning to it the responsibility for constitutional interpretation. In Article II, the appointment of Supreme Court judges was assigned to the president, with consent of the Senate. This presumably was to give the court at least an indirectly “federal” character as senators were in the original design chosen by the state legislatures.

The idea of judicial review itself was a contested one. For those who advocated a vigorous central government—the Federalists—this was self-evidently a function that should be exercised by the Supreme Court. For those defending states’ rights—the “Antifederalists”—constitutional interpretation was a function that should be exercised in a more popular and dispersed manner involving all three branches of the federal government and possibly the state governments as well. The Federalists won. They not only carried the constitution over the state-by-state ratification hurdle but also captured office in the new American government they had created. They used this position to appoint fellow travellers to such important institutions as the Supreme Court, and by far the most significant of those appointments was John Marshall.

Marshall’s first major decision settled the issue of judicial review. In *Marbury v. Madison* (1803) he declared that “an act of the legislature, repugnant to the Constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered, by this Court, as one of the

²⁵ See Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (New Haven, CT: Yale University Press, 1990).

fundamental principles of our society.”²⁶ From there, it was only a couple of logical steps to conclude which branch of government could make such a call: “It is emphatically the province and duty of the judicial department to say what the law is.” Finally, he completed the circle by asserting that the constitution was law, and that “If two laws conflict with each other, the courts must decide on the operation of each.” The US Constitution got its guardian.²⁷

Federal Supremacy

For Marshall there were two steps to establishing a centralist reading of the potentially quite confederal US Constitution. The first was to establish the authority of the Supreme Court. This he had done with *Marbury*. The second was to use that authority to establish federal supremacy. This he did with *McCulloch v. Maryland* (1819), which significantly rewrote the relationship between enumerated and residual powers.²⁸

At stake was congressional incorporation of a bank. As we saw in Chapter 6, the constitutional intent was to limit national legislation to a single list of tightly enumerated powers, and to leave all other and unmentioned powers as residual powers to the states. Since the incorporation of a bank was not explicitly mentioned among the powers given to Congress, Congress presumably lacked authority to do so. This, however, was not the way Marshall saw it. He upheld the power of Congress to incorporate a bank by a series of arguments that essentially relegated the residual powers clause of the Tenth Amendment to the dustbin of constitutional history.

First, Marshall invoked the “necessary and proper” clause of Article I, Section 8 in order to interpret the incorporation of a bank as the example of an **implied power** arising from such enumerated powers as coining money and regulating commerce. Second, he argued that in order to fulfill the “necessary and proper” requirement, a congressional act did not have to be “absolutely necessary” but only necessary in the sense of “useful” as a “means calculated to produce the end.” And third, he took on the residual powers clause explicitly, by drawing attention—in a rather sophisticated way—to the fact that the Tenth Amendment spoke only of powers “not delegated to the United States,” rather than not “expressly” delegated, as had been the case under the old *Articles of Confederation*. Obviously, this argument was meant to bolster the new doctrine of implicit or implied powers.

26 *Marbury v. Madison* (1803) 5 U.S. 137. Federalism is closely linked not just to the origins of constitutionalism, but also to the origins of judicial review; see Barry Friedman and Erin E. Delaney, “Becoming Supreme: The Federal Foundations of Judicial Supremacy,” *Columbia Law Review* 111.6 (2011): 1137–93.

27 See Forrest McDonald, *States' Rights and the Union: Imperium in Imperio, 1776–1876* (Lawrence: University Press of Kansas, 2000), 56–57.

28 *McCulloch v. Maryland* (1819) 17 U.S. 316.

Judicial Review and the Power of Politics

Even though the Court had set a precedent in *Marbury* by partially invalidating an Act of Congress, it had not done so by openly opposing itself to Congress. When it did that, for the first time half a century later, in the notorious *Dred Scott* slavery decision of 1857, political limits of judicial power began to be exposed. At stake was the question of whether a slave could claim freedom when he moved from a slave state to a free state and thus across the boundary established by the congressional *Missouri Compromise* of 1820.²⁹ Even though the Court held that it did not have jurisdiction because African slaves could never be citizens of the United States (and therefore simply should have dismissed the case), it then went on, presumably as part of its *obiter dicta*, to declare the *Missouri Compromise* unconstitutional because it would deprive slave owners of their property. Politics and history rebuked the Court when the southern states were defeated in the Civil War, and when constitutional amendments following that war ended slavery, gave citizenship to freed slaves, and at least meant to protect their voting rights.

While *Dred Scott* poured oil on the flames of a deeply divided nation, it still did not pose a direct and lasting challenge to congressional authority, as Congress was itself deeply divided. In its post-Civil War jurisprudence, the Court focused on disallowing state legislation. Most controversially it did so when states sought to regulate the increasingly oppressive conditions of America's burgeoning industrialism. In its *Lochner* decision, the Court ruled that New York's legislation limiting the working day to 10 hours violated the Fourteenth Amendment.³⁰ Under this regime of *laissez-faire* conservatism, the Supreme Court effectively held that neither level of government could regulate major aspects of the capitalist economy.³¹

This stance was pushed to the limit during the Great Depression of the 1930s when the Court declared much of President Franklin Roosevelt's New Deal legislation beyond Congress's authority under the constitution. This legislation, the Court found, assumed wide-ranging powers to regulate work conditions and the operation of business that exceed the limits given to Congress under the commerce power in particular. This was the kind of obstructionism that encouraged critics such as Laski to write about federalism's "obsolescence" in

29 *Dred Scott v. Sandford* (1857) 60 U.S. 393. See Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978).

30 Which they saw as guaranteeing "freedom of contract." *Joseph Lochner, Plaintiff in Error v. People of the State of New York* (1905) 198 U.S. 45. See Paul Kens, *Lochner v. New York: Economic Regulation on Trial* (Lawrence: University Press of Kansas, 1998).

31 Having followed up its *Lochner* decision by invalidating Congress's attempt to regulate working conditions in *Hammer v. Dagenhart* (1918) 247 U.S. 251.

the modern world.³² But Roosevelt and the Democratic Party had been elected with a clear mandate. Backed by the sense of national emergency arising from the Depression, Roosevelt opted for direct confrontation.³³ Since the constitution is silent on the number of justices making up the Court, he threatened to “pack the Court” until the obstructive justices were a minority on the bench. The prudent justices quickly managed to come up with a much more expansive interpretation of the commerce power, and by 1937 most of the New Deal legislation had been upheld.

Congressional Dominance and the “Federalism Revolution”

In the fullness of time, Roosevelt did manage to stack the Supreme Court with more sympathetic justices. This helped to perpetuate an expansive interpretation of Congress’s enumerated powers that lasted into the 1980s and confirmed that the era of states-based federalism was over.³⁴ It also opened the way for the Court to play a much more active role in protecting individual rights. Abandoning any attempt to adjudicate the relationship between Congress and the states, the Court took the position that the commerce clause embraced largely whatever Congress said it did.³⁵ This could only mean a hollowing-out of federalism, since it effectively made one set of players also the umpire. Meanwhile, the Court turned its attention to the recalcitrant states, using the weight of the Fourteenth Amendment (equal citizenship rights) to force a range of political and legal reforms on them. The impact of this was, in an interesting way, double-edged. On the one hand, it represented a radical blow against state autonomy and federal diversity. On the other hand, though, the “Court did as much as any force in the land to rehabilitate the states and their localities” by forcing them to update their practices, thus laying the basis for a revival of their position in the federal system.

32 Harold Laski, “The Obsolescence of Federalism,” *The New Republic* 98.1274 (1939): 367–69.

33 See William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995).

34 Clearly signalled in *United States v. Darby Lumber Co.* (1941) 312 U.S. 100. See Edward S. Corwin, “The Passing of Dual Federalism,” *Virginia Law Review* 36.1 (1950): 1–24.

35 See the decision in *Katzenbach v. McClung* (1964) 379 U.S. 294, where application of the *Civil Rights Act* was upheld under the commerce clause. The Court declared that “where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.”

36 David B. Walker, *The Rebirth of Federalism: Slouching Toward Washington*, 2nd ed. (New York: Chatham House, 2000), 178.

Eventually, a string of conservative appointments during the 1980s changed the ideological orientation of the bench and brought federalism back into contention. Justice William Rehnquist, who had been writing dissenting opinions as a conservative in the minority, found himself writing Court judgements as the Chief Justice of a much more conservative bench in the 1990s. The new direction began with a case in 1991 when the Court articulated a clear manifesto of federal balance.³⁷ In 1992, it struck down parts of a congressional Act on the grounds that they “commandeered” the states and thus violated the Tenth Amendment.³⁸ In 1995, it fully invalidated the national *Gun-Free School Zones Act* of 1990 as unconstitutional in that it did not constitute a matter relating to Congress’s authority under the commerce clause.³⁹ And in 2000, it struck down parts of the *Violence Against Women Act* of 1994 as also having nothing to do with commerce.⁴⁰

With one of its next big decisions, however, *Gonzales v. Raich*, the Court seemed back to old habits by using the commerce clause as a sorry excuse for upholding the power of Congress to criminalize the growth and use of marijuana, even when states were confining the use to medicinal purposes.⁴¹ The “federalism revolution,” it seemed to most observers, was effectively over.⁴² If there ever was one, that is: in *Lopez*, a conservative Court had *invalidated* a congressional act related to a favourite conservative cause: the use of firearms; in *Gonzales*, it had *upheld* a congressional act related to another favourite conservative cause: the war on drugs. One may at least harbour some suspicion that the decision in both cases was only accidentally related to considerations about the proper balance of power in a federal system; “political ideology is the touchstone for comprehending internal judicial conflict.”⁴³

As we have seen, the politicization of the US Supreme Court has been an issue ever since its inception, and the results of judicial review have always been

37 *Gregory v. Ashcroft* (1991) 501 U.S. 452.

38 *New York v. United States* (1992) 505 U.S. 144.

39 *United States v. Lopez* (1995) U.S. 549. See Kenneth T. Palmer and Edward B. Laverty, “The Impact of *United States v. Lopez* on Intergovernmental Relations: A Preliminary Assessment,” *Publius* 26.3 (1996): 109–26.

40 *United States v. Morrison* 529 U.S. 598 (2000).

41 *Gonzales v. Raich* 545 U.S. 1 (2005).

42 John Kincaid, “The U.S. Supreme Court’s Federalism Revolution: In Search of Constitutional Viagra, 1991–2005,” in Hans-Peter Schneider, Jutta Kramer, and Beniamino Caravita di Toritto (eds.), *Judge Made Federalism? The Role of Courts in Federal Systems* (Baden-Baden: Nomos, 2009), 181.

43 Christopher B. Banks and John C. Blakeman, *The U.S. Supreme Court and New Federalism: From the Rehnquist to the Roberts Court* (Lanham, MD: Rowman & Littlefield, 2012), 5; also see Herman Schwartz, “The Supreme Court’s Federalism: Fig Leaf for Conservatives,” *Annals of the American Academy of Political and Social Science* 574.1 (2001): 119–31.

influenced by the composition of the bench. At a time when that bench is ideologically divided in such a way as to hand down narrow 5:4 decisions with almost predictable regularity, the future balance—or imbalance—of judicial review in the United States will depend on who the president appoints to the Court next.

Canada: From Imperial to Home-Grown Judicial Review

As we saw in Chapter 10, Canada's judicial sovereignty remained incomplete at Confederation because the *British North America Act* (*BNA Act*) of 1867 was an Act of the British parliament and the final decision on constitutional amendments remained with the Judicial Committee of the Privy Council (JCPC), a legal board advising the Crown on empire matters. Logically then, judicial review adjudicating the constitutionality of Canadian federal or provincial legislation under the *BNA Act* would also remain under the auspices of the JCPC. And indeed it did so until 1949 when parliament, with prior approval of the JCPC, made the Supreme Court of Canada (SCC) "supreme in fact as well as in name."⁴⁴

The story of judicial review in Canada is usually told as unfolding in two phases. During the first phase, when the JCPC served as final court of appeal for Canada, judicial interpretation accomplished a radical reinterpretation of the constitutional design, from the originally centralist intentions to a much more expansive interpretation of provincial powers. During the second phase, when the SCC assumed the role of final arbiter in constitutional matters, the pendulum began to swing toward a more expansive interpretation of federal powers. As we will see, some corrections to both of these characterizations are in order.⁴⁵ In addition, a third phase can be identified beginning with the inclusion of a Charter of Rights and Freedoms in the 1982 *Constitution Act*. The Court's decisions on individual rights protection would have a divisive impact on the issue of collective provincial rights, especially in Québec.

The Imperial Phase of Judicial Review

Despite the American precedent already in full force by 1867, it seems that the Canadians were oblivious to the importance that judicial review would have on their federal system. One reason for this was that imperialism was more strongly on their minds than federalism. Final appeals to the JCPC were seen as an "essential link of imperial union" by the ruling Conservatives, and resented

⁴⁴ Peter H. Russell, *Leading Constitutional Decisions*, 3rd ed. (Ottawa: Carleton University Press, 1982), 6.

⁴⁵ See Gerald Baier, "The Courts, the Constitution, and Dispute Resolution," in Herman Bakvis and Grace Skogstad (eds.), *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, 3rd ed. (Don Mills, ON: Oxford University Press, 2012), 79–95.

by others more for the decentralist nature of the decisions handed down than out of concerns for national sovereignty. Another reason was that the idea of judicial review was alien to prevailing Westminster assumptions of parliamentary supremacy inherited from Britain.⁴⁶

All that the *BNA Act* said about the judicial branch of government was, in Section 101, that parliament *could* establish a "General Court of Appeal for Canada." It mentioned judicial interpretation neither by that court nor, for that matter, by the JCPC. True to form as an imperial statute, the *BNA Act* also did not follow the American precedent by declaring itself, and the federal law made under it, as supreme.⁴⁷ It was clear, however, that Canadian domestic laws, federal or provincial, would have to comply with the *BNA Act* as a British statute, and the judicial interpretation of what that meant was left to the JCPC.

Not quite, though: as soon as the Supreme Court of Canada was established, with some delay, by parliament's *Supreme Court Act* in 1875, it became the court of appeal for the already existing provincial superior courts and as such had to adjudicate cases under the new constitution. Deviating from the original wording and intent of Section 101, the Act also obliged the Court to hear reference cases. In a number of early cases the Court embarked upon an expansive interpretation of national power guided by the same concern about the centrifugal tendencies in the neighbouring United States that had led the Fathers of Confederation to a more centralist vision of Canada in the first place.⁴⁸ This vision, however, did not sit well with "corporations, citizens and provincial governments challenging the legislative authority of the national parliament."⁴⁹ And given the statutory limitations of both the Court and the constitutional order it was supposed to uphold, the role of final arbiter fell to the JCPC. Cases could be brought to the JCPC in either of two ways: by appealing case or reference rulings of the SCC to the JCPC, or by taking provincial court decisions to the JCPC directly.⁵⁰

It was indeed under the aegis of the JCPC that Canadian constitutional interpretation took a decisive decentralist turn. It may well be true that Britain's "Law Lords" had little interest in giving too much legal clout to a powerfully centralist government in what still was a Dominion of the British Empire. But it is also true that they responded fairly accurately to a domestic situation

46 See Russell, *Leading Constitutional Decisions*, 3–6.

47 A clause to this effect was added to the constitution only in 1982 (Section 52).

48 *Severn v. The Queen* (1878) and *City of Fredericton v. The Queen* (1880); see Russell, *Leading Constitutional Decisions*, 26–32.

49 Baier, "The Courts, the Constitution, and Dispute Resolution," 80.

50 Of the 143 cases dealing with division-of-power issues brought before the JCPC between 1867 and 1954, 73 were appealed directly from provincial courts; Russell, *Leading Constitutional Decisions*, 6, n. 8.

characterized by strong provincial loyalties and a weak sense of national union.⁵¹ Their Lordships did so by availing themselves of the same kind of constitutional clauses that had opened the floodgates of judicial review in the United States (see Chapter 6): the general authority of parliament “to make laws for the Peace, Order, and good Government of Canada” (the POGG clause), as well as the enumerated power for the “Regulation of Trade and Commerce” under Section 91. However, they gave to these broadly granted powers⁵² a restrictive meaning almost opposite to the original intention⁵³ and instead applied a much more expansive meaning to the provincial power over “Property and Civil Rights” enumerated under Section 92.

In a series of decisions between 1883 and 1925, the JCPC declared that the provinces were to be sovereign, not subordinate, entities and provided a reinterpretation of the division of powers consistent with such a premise.⁵⁴ This was accomplished by two means. One was to insist that POGG could not be interpreted as a plenary grant of power, because to do so would be to nullify Canadian federalism.⁵⁵ Instead, the JCPC ruled, the POGG clause would have force only in exceptional circumstances: either when a national emergency existed or when the matter at hand had a truly national dimension.⁵⁶ That this might be an exercise in creative jurisprudence departing from both the intentions and the letter of the constitution was of little concern to the Law Lords, who saw their task as being to “breath[e] life into Canadian federalism.”⁵⁷ The other interpretive means used by the JCPC was to give the property and civil rights clause an expansive interpretation that pre-empted the trade and commerce power.⁵⁸

The conflict between judicial review and national policy-making came to a head in Canada—just as it had in the United States—over ambitious legislative programs to tackle the Great Depression.⁵⁹ In 1935, the Conservative federal government of R.B. Bennett promised its own New Deal program by means of a series of social reform measures. While sympathetic in principle, the Liberal opposition under Mackenzie King held that the measures were beyond the jurisdiction of parliament. The measures—most notable of which was the plan for

⁵¹ Cairns, “The Judicial Committee and Its Critics.”

⁵² Also see Frederick Vaughan, *The Canadian Federalist Experiment: From Defiant Monarchy to Reluctant Republic* (Montreal: McGill-Queen’s University Press, 2003), 67.

⁵³ Saywell, *The Lawmakers*, 34.

⁵⁴ Beginning with *Hodge v. The Queen* (1883) 9 App. Cas. (P.C.) 117 and culminating in *Toronto Electricity Commissioners v. Snider* (1925) AC 396 40.

⁵⁵ Lord Watson in the Local Prohibition case, *AG for Ontario v. AG for Canada* (1896).

⁵⁶ Lord Haldane in the 1922 *Board of Commerce* case.

⁵⁷ Lord Watson’s phrase, quoted by Saywell, *The Lawmakers*, 121.

⁵⁸ *Citizen’s Insurance Co. v. Parsons* (1881); see Russell, *Leading Constitutional Decisions*, 33.

⁵⁹ The following is based on Russell, *Leading Constitutional Decisions*, 113–17.

a national system of unemployment insurance—were ruled unconstitutional by the Supreme Court, and then, on appeal, by the JCPC.⁶⁰ The JCPC held that “insurance of this kind” affected the “contract of employment” and therefore fell into the “exclusive competence of the Provincial Legislature” under the property and civil rights clause. Moreover, the judgement, by means of *stare decisis*, availed itself of its earlier restrictive reading of the POGG clause as essentially an emergency clause by declaring that “an Act whose operation is intended to be permanent” could not be construed as dealing “with any special emergency.”

It is important to note that this was not a case of federal government versus the provinces. The representatives of Ontario before the JCPC actually sided with the federal government, and only the province of New Brunswick found itself in lone opposition. Three years later, as we already noted, the *BNA Act* was amended, with unanimous support of the provinces, so as to grant the federal government exclusive jurisdiction over unemployment insurance.

It was a turning point of sorts. Even though for the time being the JCPC continued to play its part in making sure that the Macdonald vision of a *faux* federation drifting happily toward unitary government was not to be, and even though there obviously was no threat on the part of the federal government to “pack” the JCPC in its favour—as Roosevelt had threatened to do in his confrontation with the US Supreme Court—the Law Lords were not oblivious to the fact that the times were changing, and the Canadian understanding of federalism with it. In one of its last Canadian judgements, the *Canada Temperance Federation Case* of 1946, the JCPC handed down a ruling that “offered up the possibility that POGG could be more generously interpreted in areas of national concern.” Once released from the JCPC looking over its shoulder, the Supreme Court of Canada “took full advantage of this possible interpretation” and embarked upon a “cautious run of centralization” followed by a “period of ‘balanced’ federalism which has seemed to favour neither level of government.”⁶¹

The Home-Grown Phase of Judicial Review

Judicial review was patriated in 1949 when the Parliament of Canada terminated the right of appeal to the JCPC. This move was driven in considerable part by perceptions of the JCPC’s decentralist bias, perceptions that had been strongly reinforced by its invalidation of the Bennett New Deal program. The move was contested by several provinces, but upheld on appeal by the JCPC itself.⁶² The provinces clearly feared that the SCC, fully autonomous and centrally

60. *Attorney General of Canada v. Attorney General of Ontario* UKPC 7 (1937).

61. Baier, “The Courts, the Constitution, and Dispute Resolution,” 81.

62. The JCPC ruled that with the passage of the *Statute of Westminster* in 1931, the Government of Canada was free to disassociate itself from Britain in this way and thus gracefully removed itself from the scene. See *Attorney-General of Ontario v. Attorney-General of Canada* (1947).

appointed, might radically change Canadian federalism toward a more centralist orientation.

Change was unlikely to come rapidly, though. A particular interpretation of the division of powers and a formidable body of precedent had become established under the rule of the JCPC. In a string of decisions, the Court nevertheless did broaden the scope of federal powers. It did so “not through dramatic overrulings of Privy Council decisions but by choosing amongst competing Privy Council precedents.”⁶³

In 1952, aeronautics was accepted as a national responsibility under the “national dimensions” test of the POGG clause.⁶⁴ In 1960, interpretation of the trade and commerce clause was significantly broadened to encompass intraprovincial matters insofar as there are consequences for interprovincial trade. In 1967, parliament’s jurisdiction over offshore minerals was upheld under the POGG clause.⁶⁵ In 1975, sweeping wage-and-price control legislation was upheld under the national emergency test of the POGG—though the government refrained from making a substantial claim for national powers in this area.⁶⁶ In 1978 and 1979, provincial jurisdiction over natural resources was made subject to the trade and commerce power insofar as those products were destined for outside markets.⁶⁷ In 1997 and 2002 respectively, environmental protection and gun-control regulation were sustained as valid exercises of parliament’s criminal-law power, notwithstanding the absence of explicit jurisdiction in those substantive fields.⁶⁸

These decisions fuelled widespread perceptions that Canada’s highest court had indeed changed the direction of judicial review. Yet compared against the JCPC era, the percentage of federal victories had only slightly increased, from 50.5 to 54.7 per cent. And in qualitative terms, various studies found no centralist bias. Important provincial victories in areas of criminal law, property rights and consumer protection apparently found much less public attention than federal ones.⁶⁹

Of particular importance in this context has been the parallel development of intergovernmental relations as the primary agent giving direction to the federal

63 Russell, *Leading Constitutional Decisions*, 7.

64 *Johanneson v. West St. Paul* (1952).

65 In *Reference re Offshore Mineral Rights of British Columbia*.

66 In *Reference re Anti-Inflation Act*.

67 In the *Canadian Industrial Gas and Oil v. Government of Saskatchewan* (1978) and *Central Canada Potash Co. Ltd. and Attorney-General of Canada v. Government of Saskatchewan* (1979) cases.

68 In the cases of *Regina v. Hydro-Quebec* (1997) and *Reference re Firearms Act* (2000).

69 Russell, *Leading Constitutional Decisions*, 7–8.

system (see Chapter 9). While the SCC still plays a key role in watching over violations of constitutional intent, its “job as umpire has been overshadowed by the dominance of intergovernmental negotiation and compromise.”⁷⁰

The Court has taken notice. In the aforementioned *Securities Reference* of 2011 it was asked whether the federal government had authority to supersede provincial securities regulation with a central regulator. The Court rejected this by saying that the federal *Securities Act* “as presently drafted is not valid under the general branch of the federal power to regulate trade and commerce.” In the same breath, however, it elaborated on what it saw as the cooperative nature of Canadian federalism. As the Court stated, it found itself in agreement with the “dominant tide” of modern federalism by having moved its reasoning, over time, “toward a more flexible view of federalism that accommodates overlapping jurisdiction and encourages intergovernmental cooperation.” While affirming that this “promotion of cooperative and flexible federalism” must nevertheless respect the “constitutional boundaries that underlie the division of powers,” the Court suggested that the “balance” as intended by the constitution might best be served by a “cooperative approach” in order “to ensure that each level of government properly discharges its responsibilities to the public in a coordinated fashion.”⁷¹

Judicial review has kind of come full circle. It almost came out of nowhere, it then assumed a dominant role in the federal system, and it now seems that it cautiously opts for a more limited role by interpreting the constitution not just by the letter of the law but also by the political context into which that law has been placed.

The Charter

Entrenchment of the Charter of Rights and Freedoms in the Canadian Constitution via the *Constitution Act 1982* has been of far-reaching consequence for the legal fabric of the Canadian federal system. Judicial interpretation and review in the American case slowly but steadily shifted from the adjudication of the proper exercise of powers to the protection of individual rights. The late adoption of such a bill of rights in the Canadian case changed the main thrust of judicial interpretation and review with a bang.

In scope and dimension, the Charter goes far beyond a conventional bill of rights in that it contains sections on fundamental freedoms as well as democratic, legal, mobility, and language rights. Its most peculiar feature from a comparative perspective is Section 33, the **notwithstanding clause**, by

70 Baier, “The Courts, the Constitution, and Dispute Resolution,” 79.

71 *Reference re Securities Act* (2011) 3 SCR 837.

which parliament or a provincial legislature can override or derogate from three parts of the Charter—fundamental freedoms, legal rights, and equality rights—for a renewable five-year term.⁷²

The main intention of these provisions became immediately clear, as did the reasons for Québec's objection. The SCC struck down that part of a Québec language law forcing anglophone parents moving into the province to have their children educated in French as a violation of the Charter's minority language provisions. It also struck down a sign law forcing anglophone businesses in the province to display their shop signs in French only. In this latter instance, however, the Court saw this as a violation of freedom of expression, and the Québec government therefore could invoke the notwithstanding clause, pass a different language bill, and continue the sign requirement in modified form. The notwithstanding clause seeks to balance individual and collective rights, judicial and legislative supremacy.

According to one observer, there is something intrinsically democratic about "declining to give judges the last word on fundamental rights." Moreover, the periodic review requirement "imposes an obligation of deep deliberation over political choices that may conflict with Charter rights."⁷³ Such deliberation appears as "truly federal" in the sense that it designates as the essence of politics an ongoing commitment to negotiated compromise rather than to the final adjudication of rights.⁷⁴ In this view, instead of regarding the notwithstanding clause as a flaw in constitutional design, it can be appreciated as an expression of a level of political maturity beyond conventional federal systems.

Germany: Pragmatic Legalism

If the United States is the prime example of a litigation society, Germany qualifies as the opposite extreme. We have encountered the difference already in the Chapter 6 discussion of the division of powers. The Americans drafted a short document with general contours and left most of the details in the hands of politicians, citizens, and, increasingly, judges. By comparison, the designers of the much more extensive West German Constitution intended to create a document that would leave open to chance as little as possible. After the disastrous experience with unfamiliar and unrehearsed party competition in the Weimar Republic, and emerging from the abyss of Nazi totalitarianism, the post-war constitution was intended to provide Germans with a detailed and unambiguous set of rules.

72 Thus democratic, mobility, or language rights are excluded.

73 Melissa Williams, "Toleration, Canadian-Style: Reflections of a Yankee-Canadian," in Ronald Beiner and Wayne Norman (eds.), *Canadian Political Philosophy* (Don Mills, ON: Oxford University Press, 2001), 217.

74 Williams, "Toleration, Canadian-Style," 218.

Law of the State

Germany shares with other continental European societies a tradition of codified rather than common law.⁷⁵ This means that the legal system does not evolve as “judge-made” law—through case law and precedent—but instead remains tied to a firm set of codes and statutes that can be changed only by the legislative power. There has always been, in other words, significantly less room for judicial interpretation than in Anglo-American common-law systems. Public law has traditionally been seen as *Staatsrecht* (“law of the state”) rather than constitutional law, and the role of the courts is only to apply that law to cases and issues before them. This tradition was reinforced by the delayed establishment of democratic rule; only a constitution based on the consent of the people can assume a position superior to government.⁷⁶

Nevertheless, there was some traditional room for courts as arbiters between governments or government agencies. There was already a special high court to settle intergovernmental disputes during the confederal period of the Holy Roman Empire.⁷⁷ The stillborn liberal constitution of 1849—the Frankfurt Constitution—expanded on this tradition to move in the direction of judicial review. However, the imperial federation of 1871 put a stop to these developments and left constitutional interpretation entirely in the hands of the aristocratic upper house of the imperial legislature, the *Bundesrat*.⁷⁸ Under the democratic Weimar Constitution, judicial adjudication was reintroduced, and it was then for the first time that German courts moved to expand their role and assert a judicial review power in the spirit of *Marbury v. Madison*, by striking down parliamentary acts as unconstitutional. Unlike *Marbury*, though, this was done with a deeply conservative spirit hostile to the entire regime,⁷⁹ and thus it served not to strengthen but to discredit judicial review.

When the West German state was reconstituted in 1949 as a democratic polity, therefore, the constitutional designers were very much concerned with establishing a legal order tied to principles of democracy that could no longer be changed politically and at the same time would find judicial support before the courts.⁸⁰ The Federal Constitutional Court (*Bundesverfassungsgericht*) was newly

75 See David P. Conradt, *The German Polity*, 9th ed. (Boston: Houghton Mifflin Harcourt, 2009), 239–49.

76 Snowiss, *Judicial Review*, 2–3.

77 Kommers and Miller, *Constitutional Jurisprudence*, Chap. 1.

78 Werner Heun, “Supremacy of the Constitution, Separation of Powers, and Judicial Review in Nineteenth-Century German Constitutionalism,” *Ratio Juris* 16.2 (2003): 198–205.

79 Kommers and Miller, *Constitutional Jurisprudence*, Chap. 1.

80 See Martin Borowski, “The Beginnings of Germany’s Federal Constitutional Court,” *Ratio Juris* 16.2 (2003): 155–86.

established as the final authority on German democratic constitutionality and given a clear mandate to assert the supremacy of the constitution.

The Federal Constitutional Court

By contrast with appointment practices in most other federal systems, Germany's constitutional guardians are elected by a complex procedure requiring substantial degrees of interparty cooperation and compromise. The Federal Constitutional Court consists of two independent "senates" (or benches). Eight judges are appointed to each. Four of these are elected by a committee proportionally composed of members of the *Bundestag*; the other four are elected by a two-thirds majority in the *Bundesrat*. Terms are for 12 years (which may be cut short by mandatory retirement at age 68), and there is no option for re-election.

Three main types of cases can be brought before the Constitutional Court: *constitutional complaints* dealing with basic rights violations; *norm control cases* examining the constitutionality of legislation; and *jurisdictional disputes* between the two levels of government or other organs of public authority. The first senate deals mainly with basic rights issues, the second with jurisdictional conflicts.

Over the years, the Constitutional Court has commented and rendered decisions on more than half of the 151 articles contained in the constitution.⁸¹ As in other systems, most of these had to do with individual complaints about basic rights violations, complaints that are seldom successful but reach the court more frequently than elsewhere because it is the only court engaged in constitutional adjudication. As in other federal systems, the Court has also seen its fair share of intergovernmental litigation. But the most distinctive feature of the German constitutional adjudication is the norm-control procedures under Article 93 of the Basic Law, which can take either of two forms:

- **concrete norm control:** if a lower court comes to the opinion that a law under consideration in a particular case might be unconstitutional, it has to halt its proceedings and refer that law to the Federal Constitutional Court for adjudication.
- **abstract norm control:** more relevant to the federal system but far less frequently invoked, this procedure can be initiated upon request of the national government, a *Land* government, or by one-third of the members of the *Bundestag*. This referral procedure operates independently from any concrete case. A decision on the constitutionality of any federal or *Land* law or regulation can be requested, as can ratification of laws pertaining to international treaties.⁸²

81 Conradt, *The German Polity*, 236.

82 See Kommers and Miller, *Constitutional Jurisprudence*, Chap. 1.

Abstract norm control has been requested by both levels of government, but one of its main consequences has been careful constitutionality checks of all legislation at the drafting stage. Similarly relevant is the Court's adjudication of disputes between or within the branches of government. The *Bundesrat*, for example, may ask the Court to rule on the constitutionality of a law made by the *Bundestag* alone when it thinks that such a law requires its approval. Similarly, the *Bundestag* may call upon the Court when the government makes an executive decision that in the opinion of the Parliament (or, more likely, the parliamentary opposition) requires its involvement and approval.

The Literalist Approach

More than anything else it is the "eternity clause," requiring the new Germany to be a democracy, a federal state, and a social state, that has opened the gate to judicial review. In addition to policing the federal character of Germany, the Court has sought to enforce the constitution's insistence that Germany also be a democratic and a social state.⁸³ Given the detailed nature of the Basic Law and its frequent amendments updating it to time and circumstance, however, the Court has done so with a literalist approach, avoiding "creative" or "progressive" interpretations.

The first time the Court struck down an Act of the German parliament was in the *Southwest* case of 1951. Affirming its mandate under the constitution to exercise a judicial review function, the ruling of the Court was notable for declaring not only that a governmental action was unconstitutional, but also that the section of the constitution under which that action had been carried out was itself unconstitutional, since it conflicted with more fundamental assertions elsewhere in the constitution.⁸⁴ When it struck down legislation creating a national broadcaster in the *Television* case of 1961, the Court declared that the enumerated national powers are exhaustive and limiting. Broadcasting is a cultural matter, and the constitution assigns jurisdiction over cultural matters to the *Länder*.

The Court has also attempted to guard *Länder* powers against federal encroachment in a number of other cases. However, in some important areas it has notably failed to stem the tide of centralization. In one of those, it was called upon to assess the constitutionality of fiscal equalization measures that transfer significant funds from the more to the less affluent *Länder* (for which

83 In 1956 the Court ruled that a political party intending to damage or overthrow the democratic order was unconstitutional and on that basis declared the Communist Party of West Germany dissolved; *BTfGE* 5, 85 (1956). In 2000, the Court affirmed that it was in the constitutional spirit of a social state to disproportionately compensate property losses of lower value (in the former Communist east) because the less wealthy could expect a higher level of social solidarity from such a state; *BTfGE* 102, 254 (2000).

84 This and much of the following discussion is drawn from Kommers and Miller, *Constitutional Jurisprudence*.

see Chapter 7). Although the constitution requires equalization to be practised, it requires only a “reasonable” degree (Article 107); moreover, Article 109 grants the *Länder* budgetary autonomy. The Court acknowledged the legitimacy of the objections but judged the existing arrangements to be within the bounds of reasonableness.⁸⁵

As in other federal systems, the real culprit in federal encroachment has been the general “need clause” of Article 72 (see Chapter 6), which allowed the federal government to pre-empt *Länder* legislation time and again. The Court generally concurred, and even after the constitutional reforms of 1994 had tightened the clause from a “need” to a “necessity” clause (see Chapter 10), it took a full 20 years before reacting decisively. And it did so with its usual literalist approach, responding to a new constitutional reality created by the lawmakers themselves.

At stake was federal legislation aiming at a reform of the University Framework Law regulating the general conditions and qualifications for academic careers under Article 75 of the Basic Law, which when it existed allowed the federal government to pass framework legislation in enumerated areas otherwise falling under *Länder* jurisdiction. Several *Länder* asked the Constitutional Court to rule on the constitutionality of the reform under the concrete norm procedure. The Court held that it was unconstitutional because it did not meet the “necessity” criteria under the “restricted” reformulation of Article 72(2).⁸⁶

Federal Comity

As we saw, the Supreme Court of Canada elaborated on the cooperative nature of Canadian federalism in its 2011 *Securities* decision, by taking into account what it saw implicitly as the overall meaning and intent of the constitution. Similarly, the German Constitutional Court, in one of its few “creative” constitutional interpretations, developed a doctrine of **federal comity** (*Bundestreue*) from Article 20(1) of the Basic Law, according to which Germany is a democratic and social federal state.

While this Article stipulates only that Germany has to have a federal structure (and the number of *Länder* theoretically could be reduced to two), the Court deduced from it also an obligation to federal behaviour. Thus the Court has consistently admonished both levels of government to be loyal to the federal order, giving expression to the comity doctrine: “The unwritten constitutional principle of the reciprocal obligation of the federation and the states [*Länder*] to behave in a pro-federal manner governs all constitutional relationships. . . .”⁸⁷

The Federal Constitutional Court has brought German federalism into the era of judicial review. It cannot be said, however, that the introduction of judicial

85 *Financial Equalization Case* (1952). Equalization should not go beyond the *Länder* average, and it should not substantially weaken a particular *Land*'s financial strength.

86 As per the amendment of 1994; *BVerfG* 2 BvF 2/02.

87 Quoted by Kommers and Miller, *Constitutional Jurisprudence*, Chap. 3.

review has significantly altered the dynamic of German federalism. Judicial review has not assumed the wildcard role it has played in the American, Canadian, or Australian systems. Germany's form of integrated federalism and its council-based federal chamber work to minimize the litigiousness of the system. Most conflicts over the distribution of powers are resolved through intergovernmental negotiation and compromise and never reach the Constitutional Court.⁸⁸ As we have seen in earlier chapters, judicial decisions have nevertheless played an active role in prompting legislative and constitutional reform in major areas of German federalism, including the division of powers and fiscal equalization.

The EU: Judicial Creation of Supranationality

As we have noted elsewhere in this book, the EU is an outlier in comparative federalism: a federation-in-the-making with confederal characteristics. Nonetheless, it has its own federal court. Moreover, that court, the European Court of Justice (ECJ),⁸⁹ has played a prominent and sometimes unexpected role in the process of European integration. Originally designed as a watchdog over the treaties, it has acquired direct jurisdiction not only over member states but over corporations and individual citizens within these member states as well. The result has been described as "the judicial construction of Europe."⁹⁰ How is it that a system of intergovernmental treaties has become the basis for a more legally certain system of governance that is subject to independent judicial review, and why have the EU's member states resisted that judicial centralization so little?

The story of how this came about is largely one of unintended consequences.⁹¹ The original designers of the European Community agreed that there had to be a court that would force member states to comply with treaty provisions. Much like the American case, few detailed thoughts were spent on how exactly the court would do that. And, again as in the American case, it fell upon the court itself to seize the initiative and establish its authority as the ultimate arbiter and interpreter of European treaty law.

The European Court of Justice

The ECJ was established by the ECSC treaty of 1951. In keeping with the confederal origins of the EU, the ECJ is composed of one judge chosen by each member state (now 28), thus making it one of the most truly federal of such

88 Kommers and Miller, *Constitutional Jurisprudence*, Chap. 3.

89 Officially the Court of Justice of the European Union.

90 Alex Stone Sweet, *The Judicial Construction of Europe* (Oxford: Oxford University Press, 2004).

91 Lisa Conant, *Justice Contained: Law and Politics in the European Union* (Ithaca, NY: Cornell University Press, 2002); Leslie Friedman Goldstein, *Constituting Federal Sovereignty: The European Union in Comparative Context* (Baltimore, MD: Johns Hopkins University Press, 2001).

courts.⁹² In line with the prevalent European tradition, it renders its judgements unanimously, without issuing multiple or dissenting opinions; rather, it speaks with one voice and thereby increases the effect of its decisions. The ECJ, in other words, decides cases on the basis of one single judgement.

The bulk of cases reach the ECJ by process of referral from national courts dealing with specific issues within their country that raise questions of Community-wide application. Apart from approximately 200 preliminary rulings of this kind per year, the ECJ also adjudicates many direct cases brought before it by other Community institutions, member states, and natural or legal persons. Most of these have to do with violations of trade and competition law. In order to stem this tide, a lower Court of First Instance has been established (1989) for which the ECJ has become the court of appeal.

When the ECJ began its work, it was not clear that the treaties had established, or were meant to establish, a supranational political system with sovereignty in its own right. As much as the presumption prevailed that the member states had retained their sovereignty in full, the treaties were no more than international agreements. The signatories had pledged to uphold these treaties, to be sure, and they had even agreed to make joint decisions by qualified majority rule eventually, but they had not explicitly agreed to make their national bodies of law subservient to European law. Hence it was far from clear that national court systems would look to the ECJ instead of their own high courts as the final authority of legal adjudication. Nevertheless, this is what happened.

Establishing Supremacy

Despite the confederal beginnings of the EU, it was clear that the signatories wanted to establish something that was meant to be more lasting and of a more intensive character than a set of merely international agreements. And here the Court took its cue by issuing its early decisions with a clear intention of providing the system with the kind of legal certainty that the founding politicians had omitted or even evaded. Essentially, it did so in three logically connected steps.⁹³

- In its most formative cases, the ECJ first declared that it was the manifest intention of the treaties to establish a system of shared sovereignty, a “new legal order.”⁹⁴ The treaties, then, had to be regarded as the source of

92 To keep the Court a manageable size since the enlargement of 2004, plenary sittings have now been limited to a sitting bench of 11. Often, the Court also decides in chambers of three or five judges.

93 On the following see Desmond Dinan, *Ever Closer Union: An Introduction to European Integration*, 4th ed. (Boulder, CO: Lynne Rienner, 2010), 268–69.

94 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* (1963) and *Costa v. ENEL* (1964).

primary law comparable to a constitution. All laws and regulations made under the treaties would constitute a body of secondary law. Within this context, the ECJ could begin to interpret the validity of Community law as if the treaties had constitutional character.

- Second, the ECJ established on this basis what is known as the “direct effect” of primary or treaty law.⁹⁵ It held that the Community constituted a new legal order under which individual citizens or corporations could claim protection from contravening national laws and actions. Such individuals, in other words, could claim that a particular domestic law or regulation violated their rights as members of the Community, and the ECJ would in fact invalidate that domestic law or regulation.
- And third, the ECJ established the *supremacy* of Community law as following logically from the above. In a 1978 decision that summed up all previous developments, the ECJ held that “every national court must . . . apply Community law in its entirety . . . and must accordingly set aside any provisions of national law which may conflict with it.”⁹⁶ This was taken one step further in a 1987 decision declaring that the courts of member states “do not have the power to declare acts of the Community institutions invalid,” since to do so would be to make Community law different from country to country and “to place in jeopardy the very unity of the Community legal order.”⁹⁷

The main work of the ECJ has been in enforcing the common market. In doing so, it elevated the status of the European Community by cementing the quasi-constitutional character of the treaties. The unity of the European legal order, however, applies only to the functioning of a common market among member-state jurisdictions with diverse regulatory standards. In order to accommodate the fact that harmonizing standards across jurisdictions would be impossible as well as undesirable, the Court developed the innovative principle of **mutual recognition**. In the *Cassis de Dijon* case of 1979, it ruled that differing national standards could continue, provided that each country recognized the standards of the others as valid.⁹⁸

Voluntary Compliance

Member states have routinely complained about the ECJ and its supranationalist interpretations of treaty law, and they have often delayed compliance with its rulings. Not surprisingly, the most vigorous opposition has come from

95 See Conant, *Justice Contained*, 53.

96 *Simmenthal v. Commission* (1978).

97 *Foto-Frost v. Hauptzollamt Lübeck-Ost* (1987).

98 *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein* (1979) ECR 649.

the UK. Britain joined the Community after the ECJ had already established Europe's basic legal judicial framework. Moreover, the very existence of a constitutional high court was alien to Britain's tradition of common law and parliamentary supremacy. Therefore, when the Court first overruled an act of parliament, in 1991, "national furor" erupted.⁹⁹ The British government even tried to negotiate a treaty revision that would have weakened the ECJ's position and role. However, the overwhelming view prevailed that the legal system of the Community was in everyone's best interest and therefore should be left unchanged.

The big question is why this view should prevail when the ECJ assumed powers of adjudication that were unforeseen and when governments would routinely be exposed to rulings criticizing or even invalidating their behaviour. As some commentators have noted, despite beginning from a far weaker constitutional base, judicial review has encountered far less resistance in the EU to date than it did for decades after the ratification of the US Constitution.¹⁰⁰

Indeed, this lack of resistance to judicially created supranationality would seem to disprove one of the key arguments that led the Americans from confederation to federation. As Hamilton wrote in *Federalist* 23, the new national union needed "means . . . proportioned to the end." It had to have, in other words, the capacity to enforce its own laws. The European Union, however, has neither army nor police to do so; nor does it have significant fiscal powers for a carrot-and-stick approach. It relies entirely on voluntary compliance, which is in turn grounded in mutual agreement. A first answer to why this has occurred may be found in a certain degree of deference to legalistic solutions more prevalent on the European continent, with its statutory and Roman-law tradition, than, say, in Britain. Second, legal certainty was one of the fundamental objectives of European integration in the first place. Most of the early decisions of the ECJ had to do with trade and competition policy. Market harmonization required certainty of the law. This was in the interest of the powerful transnational business interests driving the integration process. Where ECJ decisions have successfully propelled integration, it would seem they have done so because of widespread support from powerful social interests.¹⁰¹ Third, it may also be significant that the EU incorporates many of the confederal assurances for member states that Antifederalists feared they had lost with the US Constitution—notably direct input of member states into major decision-making and the composition of the Court.¹⁰² Finally, one can discern in the universal acceptance of the ECJ and its rulings a genuine desire for and commitment to a European order of peace and stability that overrides nationalist sentiments. It is this commitment

99 Dinan, *Ever Closer Union*, 273.

100 Goldstein, *Constituting Federal Sovereignty*.

101 Conant, *Justice Contained*.

102 Goldstein, *Constituting Federal Sovereignty*, 43.

more than anything else that distinguishes the EU from other international economic organizations.

This commitment has also contributed to the ECJ's acceptance by national courts, which routinely ask it for preliminary rulings on the compatibility of national laws with Community law. This "complicity" is particularly notable for the fact that such requests do not come just from supreme courts—which are obliged to seek "authoritative guidance" from the ECJ—but also from lower-level courts, for whom it is optional.¹⁰³ Given that the entire system of European jurisprudence—like the rest of the EU—still finds itself in a state of evolutionary flux, the current acceptance and practice of European law supremacy can be best understood itself as a form of "negotiated compromise."¹⁰⁴

That state of affairs became obvious most recently when the German Federal Constitutional Court was asked to rule on the constitutionality of the European Stability Mechanism (ESM), a treaty among the 17 member states of the Eurozone to set up a common fund for the purpose of managing the fiscal crisis that had engulfed several member states since 2008. The treaty was made possible by a prior amendment to Article 136 TFEU (proper functioning of economic and monetary union) to this effect. Led by Euroskeptical politicians, several large citizen groups contended before the Court that the German commitment to finance a large portion of the fund infringed upon the budgetary autonomy rights of the German parliament. The Court disagreed, but stipulated tight conditions for future enlargements of the fund.¹⁰⁵ Interestingly, however, it did so just two months before the ECJ was to hand down a ruling on the question of whether the creation of the ESM, and with it the amendment to Article 136 TFEU, went beyond EU powers granted under the treaties—which the ECJ denied.¹⁰⁶ Therefore, while the ECJ did not contradict the German Court, it would certainly appear that the German justices wanted to uphold and emphasize the Court's role as the primary guardian of law and order under the Basic Law.

Judicial Review and Subsidiarity

A particularly thorny issue has been the ECJ's response to the principle of subsidiarity. As we saw earlier, the primary role of supreme or constitutional courts in federal systems is to watch over the division of powers as established by the letter—and spirit—of constitutional documents. In the EU, however, not only are most powers concurrent, but the distribution of tasks is regulated by the

103 Dinan, *Ever Closer Union*, 270.

104 Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2001), 38.

105 *BvR* 1390/12 (2012).

106 *C*-370/12 (2012).

procedural rules of subsidiarity and proportionality (see Chapter 6). At first glance it would seem that there is no room at all for adjudication of what essentially is a political matter and process. And indeed, the justiciability of the principle of subsidiarity has been questioned right from its inception, and with it the wisdom of removing from legal certainty one of the core issues of governance in systems of divided jurisdiction.¹⁰⁷ However, not only has the ECJ put its judicial imprint on the understanding and practice of subsidiarity over the years, but the *Protocol on the Application of the Principles of Subsidiarity and Proportionality* now also states explicitly that the ECJ “shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity” (Article 8).

The Court found ways to exercise this jurisdiction. In a 1998 judgement, it conceded that judicial review generally had to be “limited to verifying whether the relevant procedural rules have been complied with” as the Court could not second-guess the (legislative) Council’s “assessment” of a need for Union action unless, that is, such action was “manifestly inappropriate” as a “misuse of powers.”¹⁰⁸ This reasoning then evolved into a “*de facto* subsidiarity review” two years later when the Court invalidated a European Union Directive aimed at the uniform prohibition of tobacco advertising.¹⁰⁹ Without ever mentioning subsidiarity explicitly, the Court held that the directive in its general sweep went beyond the Union’s concurrent power of regulating the functioning of the internal market (Article 114 TFEU), as this power would extend only to “eliminating obstacles to the free movement of goods and to the freedom to provide services, and to removing distortions of competition.” As the Court reasoned with an implicit nod to proportionality, Union action could be considered in line with the objective of regulating a functioning market only to the extent that it aimed at removing member-state “disparities . . . liable to hinder the free movement of goods,” but not if it responded to the “mere finding of disparities between national rules.”¹¹⁰

In an interesting way, this judgement foreshadowed the German Constitutional Court’s restrictive reading of the reformed Article 72(2) in the Basic Law as a “necessity” rather than “need” clause a few years later (see above). More generally, the ECJ’s handling of the thorny subsidiarity issue once more highlights

107 See George A. Bermann, “Taking Subsidiarity Seriously: Federalism in the European Community and the United States,” *Columbia Law Review* 94.2 (1994): 331–456.

108 *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union* C-150/94 (1998).

109 On this and the following see Thomas Horsley, “Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?” *Journal of Common Market Studies* 50.2 (2012): 267–82.

110 *Federal Republic of Germany v. European Parliament and Council of the European Union* C-376/98 (2000).

the pivotal role accorded to judicial review in federal systems. Judicial reasoning provides a fascinating prism through which to better understand the tension between constitutional intent and political practice. It also brings to light its limitations in political systems driven by political will and ambition.

Imitations, Variations, and Exceptions

Variant experiences range from the case of Australia, where patterns of both federal design and judicial interpretation show strong parallels with the United States, to Switzerland, an entirely anomalous federation in tackling the challenge of jurisdictional clarification without a supreme judicial umpire at all. The supreme-court model of constitutional guardianship that we have examined in the American and Canadian experiences is also found in Australia, India, and Brazil—the two other federations emerging out of the British tradition and one strongly influenced by the American system. Otherwise, the discrete constitutional court approach has prevailed. Newly federalizing states in Spain, Belgium, and South Africa have all established a court with exclusively constitutional concerns and invested those courts with clear authority to practise judicial review.

Constitutional Undoing in Australia

As with the American and Canadian cases, the Australian case is worth noting for the way in which the realities of constitutional interpretation and political practice diverged sharply from constitutional intentions. As we noted in Chapter 6, the framers of the Australian Constitution deliberately opted for the American constitutional design because they wanted nothing to do with the kind of centrally dominated approach adopted in Canada. Partly as a consequence of choosing the American approach they ended up with something closer to what Sir John A. Macdonald had intended but manifestly failed in practice to achieve for Canada. Unlike the *BNA Act*, the Commonwealth Constitution quite clearly established a separate judicial power and by reasonably strong implication assigned a judicial review function to the High Court.¹¹¹ The new constitution also signalled its supremacy.¹¹² Unlike the Canadian case, the High Court rather than the JCPC controlled the process of constitutional interpretation from the very beginning.

Once the framers lost their grip on the High Court, judicial interpretation shifted from an intentionalist to a literalist philosophy, and the weakness of the

111 In Sections 71 and 74 respectively. See, however, James A. Thomson, "Constitutional Authority for Judicial Review: A Contribution from the Framers of the Australian Constitution," in Gregory Craven (ed.), *The Convention Debates 1891–1898: Commentaries, Indices and Guide* (Sydney: Legal Books, 1986), 173–202.

112 In a weaker version of the US Constitution's supremacy clause. Clause 5 of the Preamble says: "This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State. . . ."

single-list design and the “asymmetrical” allocation of powers it created became apparent.¹¹³ Particularly damaging to the position of the states has been the blanket grants of authority under the Section 96 “spending power,” whereby the Commonwealth may grant money to the states “on such terms and conditions as the Parliament thinks fit.” In addition, centralization has been facilitated by expansive interpretation of such key enumerated powers as the “External affairs” and “corporations” powers.

With the spending power, the High Court has licensed not only the broadly intrusive use of conditional grants,¹¹⁴ but also the more coercive reduction of state power through the punitive use of that spending power. In 1942, the Commonwealth took full control of income tax by making eligibility for receipt of grant moneys conditional upon the states vacating the field.¹¹⁵ As we saw in Chapter 7, this underpinned Australia’s very high level of vertical fiscal imbalance (VFI). With the Section 51(xxix), the external affairs power, the High Court has refused to draw any limits on the extent to which the Commonwealth may legislate in areas of state jurisdiction pursuant to an international treaty or covenant.¹¹⁶ This contrasts with the extremely restrictive interpretation applied by the JCPC to the equivalent clause in the *BNA Act*. Most recently the Court has upheld sweeping application of Section 51(xx), the “corporations power,” which allows the Commonwealth parliament to legislate on “foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.”¹¹⁷ As in the United States, the existence of a clause in the Australian Constitution guaranteeing protection of residual state powers

¹¹³ Michael Crommelin, “The Federal Model,” in Gregory Craven (ed.), *Australian Federation: Towards the Second Century* (Carlton: Melbourne University Press, 1992), 43. The watershed decision was the Engineers’ case, *Amalgamated Society of Engineers v. Adelaide Steamship Company* (1920). For a general survey, see Galligan, *Politics of the High Court*.

¹¹⁴ See the Court’s dismissive one-sentence judgement in the Roads case, *The State of Victoria v. The Commonwealth* (1926) 38 CLR 399.

¹¹⁵ This was upheld by the High Court as a legitimate use of the spending power under Section 96. See *South Australia v. the Commonwealth* (1942) 65 CLR 373. In general, see Alan Fenna, “Commonwealth Fiscal Power and Australia Federalism,” *University of New South Wales Law Journal* 31.2 (2008): 509–29.

¹¹⁶ Although it did so by narrow majorities with strong dissenting opinions. The landmark cases have concerned imposition of racial discrimination legislation implementing principles of the United Nations Covenant on Human Rights and protection of “world heritage” wilderness sites listed with UNESCO: *Koorwara v. Bjelke-Petersen* (1982) 153 CLR 168 and *The Commonwealth of Australia v. Tasmania* (1983) 158 CLR 1 (the Franklin or Tasmanian Dam case).

¹¹⁷ *New South Wales v. Commonwealth of Australia*; *Western Australia v. Commonwealth of Australia* (2006) 231 ALR 1.

(Section 107) has proven of little support to a jurisprudence of states' rights. The High Court of Australia has been a handmaiden to centralization. ¹¹⁸

People's Federalism in Switzerland

We suggested at the outset of this chapter that judicial review is almost unavoidably part of the functioning of a federation. How else can the inevitable constitutional ambiguities and jurisdictional disputes be resolved? Constitutional or supreme courts play that crucial umpiring role and in the process may well have a considerable impact on the evolution of a federation. But there is an exception to this otherwise firm generalization: Switzerland. While following the American lead in several respects when designing their restructured federation in 1848, the Swiss did anything but follow the US Supreme Court model.

As a loose confederation for most of its history, Switzerland, like other confederations, did not develop a practice of judicial review. With the transition from confederation to federation in 1848, a federal court, the *Bundesgericht*, was constitutionally established as a civil court, which meant that it was prohibited from adjudicating matters of public or constitutional law. Under the revised constitution of 1874, the court was then empowered to adjudicate public-law disputes between the two levels of government or among the cantons, but not disputes about the validity of federal laws. This reflected in part the fact that the federal government had few functions at this time.¹¹⁹ After a second major revision of the constitution had been adopted by the people in 1999, a reform of the judicial system was approved in a second referendum in 2000. The Swiss Constitution now states even more forcefully that "acts of the Federal Assembly or the Federal Council [the executive government] cannot be challenged before the Federal Court" (Article 189), and that "the Federal Court and all other authorities are held to apply federal and international law" (Article 190).

The Federal Council had proposed for the 1999 constitutional revision that this continued prohibition of federal law review be abandoned, but this was rejected by the National Assembly.¹²⁰ Hence the Court must apply federal law even if it violates the constitution. One might think that the absence of judicial controls on the exercise of power by the federal government would be an open invitation to the expansion of that power and centralization of the federal system. However, the absence of judicial review in Switzerland has been made possible by Switzerland's system of direct democracy, which, it seems, has worked as effectively—or indeed more effectively—to moderate centralizing tendencies.

¹¹⁸ This can be interpreted as constructive adaptation or perfidious undoing. On the former see Galligan, *Politics of the High Court*; on the latter see James Allan and Nicholas Aroney, "An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism," *Sydney Law Review* 30.2 (2008): 245–94.

¹¹⁹ Christine Rothmayr, "Towards the Judicialisation of Swiss Politics?," *West European Politics* 24.2 (2001): 78.

¹²⁰ Rothmayr, "Judicialisation," 77.

12

The Limits of Federalism

AS WITH ALL GOOD IDEAS, THE promise of federalism is unlimited. As with all political arrangements, though, the realities are somewhat less so. The limitations are roughly twofold. The first is the number of prerequisites for federalism to be viable at all. The twentieth century is littered with “failed” or “defunct” federations, most of which simply were not real candidates for a federal solution in the first place. Such experiments, often imposed, end in tears as constituent units secede or the entire regime falls apart. This is not to say that the resulting unitarist solutions are entirely satisfactory either.¹ The other type of limitation is the reality that even in the “successful” federations, things are not always going to be smooth sailing. Successful federations may experience both low-level and high-level frustrations deriving from the coexistence of two levels of sovereign government and, in some cases, from the coexistence of different identities.

The Nature of Federalism: A Reprise

We may recall that federalism is a form of balance between divided and shared rule, unity and diversity, agreed upon in an original compact and enshrined in a constitutional document. In that document, powers are divided between two levels of government, but in reality they remain overlapping or even contested. Financial resources are assigned or shared according to estimated targets of cost and need, but in an economic union of dynamic market forces, they are jealously watched moving targets. The principle of dual representation, which so much preoccupied the designers of the classical federations, turned out to provide the constituent members of these federations with rather tenuous access to shared rule only, and particularly so in the context of modern electoral and party politics. For all these reasons, intergovernmental relations assumed an unforeseen centrality in the functioning of federal systems, often precariously oscillating between cooperation and conflict. And finally, because they reflected the foundational character of the original agreement, constitutions were protected by difficult rules for amendment, which in turn added to the role of courts as ultimate guardians of constitutionality the likewise unforeseen task of judicial review, the adjustment of constitutional meaning according to time and circumstance.

¹ Thomas Goumenos, “The Pyrrhic Victory of Unitary Statehood: A Comparative Analysis of the Failed Federal Experiments in Ethiopia and Indonesia,” in Emilian Kavalski and Magdalena Zolkos (eds.), *Defunct Federalism: Critical Perspectives on Federal Failure* (Aldershot, UK: Ashgate, 2008), 31–46.

All of the above makes federalism a form of government that is perpetually engaged in compromise, requires substantial amounts of goodwill and cooperation, and is generally characterized by change: “federalism is continuously in motion.”² Over the long haul, this dynamic has generally been one of centralization—though much more so in some federations (US, Australia) than in others (Canada, Switzerland). In the case of Germany, however, we noted how the integrated form of administrative federalism allowed only little room for reform aimed at disentanglement. We characterized the European Union as an open-ended process of treaty federalism with an as yet uncertain outcome: while membership enlargement and financial crisis point to the need to complete the federal form, the principle of subsidiarity is simultaneously invoked as a rallying cry for confederal retrenchment.

All this being said, these realities simply strike us as the normalcy of federalism as a system of negotiated political accommodation. The dynamics of federalism, centralization or decentralization, continuity or discontinuity, in accordance with original constitutional intent or not, are determined by a variety of factors including path-dependent historical development, institutional and procedural responses to social change, and actor-driven policy reform or innovation.³

To accept perpetual compromise as limited success in the already existing and functioning federations is one thing. To assume that this form of federal political accommodation can be successfully exported everywhere, or that it even can resolve all of the world's problems, is quite another. In this concluding chapter, therefore, we first explore the limits of federalism in terms of the capacity and will of diverse societies to organize and engage in the complex bargaining game that federalism entails, and then turn to one of the oldest questions about the limits of federalism: its relationship with democracy and capitalism.

Limits of Capacity and Will to Federate

In Chapter 3 we listed a number of twentieth-century federations that most obviously constitute federal failure by falling apart or becoming unitary states (Table 3.2). As Wheare noted, federalism's “prerequisites are many,”⁴ and in most instances of federal failure, those prerequisites were far from being met. In the former Soviet instances, a system of *faux* federalism had existed under communist rule, and dismemberment coincided with the collapse of communism.⁵ For

2 Arthur Benz and Jörg Broschek, “Federal Dynamics: Introduction,” in Arthur Benz and Jörg Broschek (eds.), *Federal Dynamics: Continuity, Change, and the Varieties of Federalism* (Oxford: Oxford University Press, 2013), 14.

3 See similarly Benz and Broschek, “Federal Dynamics: Introduction,” 11.

4 K.C. Wheare, *Federal Government*, 4th ed. (Oxford: Oxford University Press, 1963), 35.

5 For instance, Matt McCulloch and Silvia Susnjik, “The Failure of the Socialist Federal Republic of Yugoslavia (1945–1991): A Story of Contradictions, Weaknesses, and Tensions,” in Emilijan Kavalski and Magdalena Zolkos (eds.), *Defunct Federalism: Critical Perspectives on Federal Failure* (Aldershot, UK: Ashgate, 2008), 115–27.

others, such as the West Indies or Libya, some or all of the reasons for coming together as a federation that we discussed in Chapter 5 were entirely absent or simply not strong enough to hold the federation together.⁶ As one commentator put it: neither the leaders nor the people in the federating units had a “positive political or ideological commitment to the primary goal of federation as an end in itself.”⁷ Self-interest proved too strong to accept the compromises necessary for a common enterprise.

A much more recent discussion of the limits of federalism has been occasioned by the dramatic rise of secessionist movements in federations that we have discussed in this book as cases of federal success: Québec separatism in Canada, Catalonia’s quest for independence in Spain, and the prospects of a Belgian breakup. The question driving these discussions is whether federalism does in fact provide opportunity structures for secession or breakup, and the answer given points to the “will and capacity” to do so.⁸

Despite the undeniable role as opportunity structures that powerful subnational governments can play in fomenting and organizing support for secession or breakup, and despite the likewise undeniable presence of will and capacity among leaders and people in the cases mentioned above, secession or breakup has not happened—and is unlikely to happen. In Canada, the certain benefits of federation (*fédéralisme rentable*, or “profitable federalism”) appear to have won the day over the uncertainties of independence, at least for the foreseeable future; in Spain, a non-binding Catalanian referendum on independence held despite a prohibition by the Spanish government in November 2014 can be regarded as being in the main a bargaining chip in the quest for more autonomy; and in Belgium, the costs and complications of a breakup, especially in the context of European Union membership, may yet induce the political classes on either side of the Dutch–French divide to agree on another round of constitutional reform in the direction of further confederal decentralization. The decisive defeat of the Scottish independence referendum in September 2014 may well result in a sobering reassessment of the “will and capacity” for secession or breakup in these cases and others.

For the purpose of our own concluding discussion of the limits of federalism, however, we want to turn the will and capacity argument around: to what extent is federal success limited by insufficient capacities to organize participation in the federal bargaining game of balancing interests and benefits, and to what

6 Amanda Sives, “Dwelling Separately: the Federation of the West Indies and the Challenge of Insularity,” in Emilian Kavalski and Magdalena Zolkos (eds.), *Defunct Federalism: Critical Perspectives on Federal Failure* (Aldershot, UK: Ashgate, 2008), 17–30.

7 Thomas M. Frank, “Why Federations Fail,” in Thomas M. Frank (ed.), *Why Federations Fail: An Inquiry into the Requisites for Successful Federations* (New York: New York University Press, 1968).

8 Jan Erk and Lawrence Anderson, “The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions?,” *Regional and Federal Studies* 19.2 (2009): 196.

extent is it outright impossible in the absence of a shared commitment and will to compromise?

Inability to Organize

Federalism, Vincent Ostrom once acknowledged, places “a substantial burden upon citizens for a relatively high level of education and information in order to take advantage of the opportunities inherent in the system.”⁹ What Ostrom had in mind was that a multi-tiered form of government would make it harder for the socially disadvantaged to look after their interests than it would be for the advantaged. We shall return to this argument later. For now, we want to extend it by arguing that federalism also places a high burden on disadvantaged member units collectively, and does so despite formally granted membership equality.

In Chapter 5, we discussed “infrastructural capacity” as a precondition for the successful establishment of a federal system: while the pre-existence of such capacity in the German territories was integral to the formation of a federal union in 1871, the lack of it in Italy, as Wheare already pointed out, may have been the main reason why modern Italian statehood took a unitary form instead.¹⁰ As we also indicated in Chapter 5, the lack of infrastructural or governmental capacity continues to pose a serious problem in cases where federalism has been established in spite of this lack because, as in the case of South Africa, for instance, it offered the most promising road to national reconciliation and democratization.¹¹ “Ineptitude” at the subnational level seems to have left little alternative to centralization.¹²

Infrastructural or governmental capacity, however, does not exhaust itself in government buildings and administrative offices. Rather, these have to be populated with people who have access to high levels of education and information, and, in some cases, a common language, in order to participate successfully in the sharing of power and resources. A particularly instructive case is that of Canada and Québec, where a gap between rapid economic development and delayed “political modernization” had kept the francophone province from full shared-rule participation and the benefits thereof, and the Quiet Revolution essentially

9 Vincent Ostrom, “Can Federalism Make Difference?,” *Publius* 3.2 (1973): 231

10 Wheare, *Federal Government*, 48; Daniel Ziblatt, *Structuring the State: The Formation of Italy and Germany and the Puzzle of Federalism* (Princeton, NJ: Princeton University Press, 2008).

11 See Christina Murray and Richard Simeon, “Promises Unmet: Multi-Level Governance in South Africa,” in Rekha Saxena (ed.), *Varieties of Federal Governance: Major Contemporary Models* (New Delhi: Cambridge University Press, 2011).

12 Nico Steytler, “Judicial Neutrality in the Face of Ineptitude: The Constitutional Court and Multi-Level Governance in South Africa,” in Hans-Peter Schneider, Jutta Kramer, and Beniamino Caravita di Toritto (eds.), *Judge Made Federalism? The Role of Courts in Federal Systems* (Baden-Baden: Nomos, 2009), 27–42.

was a call to arms on the part of a new civic consciousness demanding a more active development and use of Québec's governmental capacity.¹³ By comparison, an important explanation for the continued disadvantage of Canadian Aboriginal peoples in what at least by now amounts to federal inclusion in a "mosaic" of multilevel negotiations and agreements is the unevenness of their "capacity to engage in intergovernmental relations."¹⁴

A similar observation can also be made with regard to the opportunity structures for inclusion in the case of the European Union. As we pointed out in Chapter 7, one of the problems with the Structural Funds and convergence policy more generally is that they are set up in such a way as to reward already existing efficiency. Another and related problem, however, is infrastructural, administrative or governmental capacity yet again. Regional policy in the EU requires a sophisticated interplay of national and regional governments with the European Commission. There is evidence not only that it is the strength of regional political authority rather than need that determines the allocation of Structural Funds,¹⁵ but moreover that regions with poor administrative capacity also underutilize funds already allocated to them.¹⁶

All this does not bode well for federalism as a tool of conflict management in what are mostly developing countries with very poor governmental capacity, such as Iraq or Libya. A particularly salient case is the Republic of Yemen, where a Constitutional Drafting Commission (CDC) was given the task of finding a federal solution to disunity and conflict. The key issue that the CDC had to wrestle with in terms of federalism is the "southern question."¹⁷ Years of abuse and civil war after reunification of the former communist People's Democratic Republic of Yemen with the more populous north have resulted in deep southern mistrust of any form of central governance. In order to break up the north-south divide, the constitutional draft as submitted to Yemen's president in January

13 The classic English-language study is Kenneth McRoberts, *Quebec: Social Change and Political Crisis* (Toronto: McClelland and Stewart, 1988).

14 Martin Papillon, "Canadian Federalism and the Emerging Mosaic of Aboriginal Multilevel Governance," in Herman Bakvis and Grace Skogstad (eds.), *Canadian Federalism: Performance, Effectiveness, and Legitimacy* (Don Mills, ON: Oxford University Press, 2012), 297.

15 Adam W. Chalmers, "Regional Authority, Transnational Lobbying and the Allocation of Structural Funds in the European Union," *Journal of Common Market Studies* 51.5 (2013): 815-31.

16 Simona Milio, "Can Administrative Capacity Explain Differences in Regional Performances? Evidence from Structural Funds Implementation in Southern Italy," *Regional Studies* 41.4 (2007): 429-42.

17 See http://www.constitutionnet.org/files/140118_agreement_on_the_southern_question_en_final.pdf; additional information is mainly supplied by Thomas O. Hueglin, who served as external adviser to the CDC in 2014.

2015 proposes a new division of Yemen into six federal regions. This provision has been rejected by the Houthis, a northern Shiite rebel group, which has meanwhile overrun and occupied the capital, Sana'a, in order to prevent what its leaders fear would be a loss of their northern power base.

But even if created, these new regions would almost entirely lack infrastructural capacity, and the fear is that the same corrupted forces of old would dominate them. Much of the CDC's constitutional drafting efforts therefore focused on transitional provisions, which would allow central administration to continue under strict shared-rule guidelines until regional governmental capacities may have developed. With negotiated efforts at federalization displaced by armed conflict over central control, they may never develop.

Unwillingness to Compromise

Moreover, even if agreement on a constitutional draft were eventually achieved, it is far from certain—or perhaps even rather unlikely—that it would be endorsed by the south in the required national referendum. Representing all groups and factions of Yemen's society, the members of the CDC have been impressively successful in lowering the level of mutual mistrust through months and months of intense deliberation. Similar to European Union comitology (see Chapter 9), the CDC can be appreciated as a political space facilitating deliberation “about the meaning of shared rules” without presupposition of an already existing community with shared norms.¹⁸ In sharp contrast to even the weak sense of community among the peoples in the EU, however, there is for now little hope that the exercise in trust-building on the part of the CDC will spill over into Yemen's society at large.

As we argued in the opening chapter on federal promise, the success of the Good Friday Agreement in bringing peace to Northern Ireland depended on a parallel strategy of trust-building: the main combatants had to be included in a power-sharing scheme, which in turn had to be secured by institutionalized mechanisms of external intergovernmental cooperation and pressure. But before such an eventual outcome can even be contemplated, there has to be a “will to federate”¹⁹ from which alone can come the kind of compromises necessary for a solution. Moreover, that solution must be carried by a shared understanding, not just of common interest, but of “fairness” in the sense that a federalist compromise will not only satisfy the autonomy aspirations of divided identity groups but also accommodate the self-understanding of individual citizens

18 Jürgen Neyer, “Discourse and Order in the EU: A Deliberative Approach to Multi-Level Governance,” *Journal of Common Market Studies* 41.4 (2003): 696.

19 Ronald L. Watts, cited in David Cameron, “The Paradox of Federalism: Some Practical Reflections,” *Regional and Federal Studies* 19.2 (2009): 315.

thinking of themselves as “members of both the federal and the sub-state nation in addition.”

All these predispositions and conditions amount to a tall order for federal success. In the classical coming-together federations, the “constitution is federalism’s social contract”—a foundational agreement among already existing political communities for mutual security and economic benefit.²¹ Even in some of these classical federations, however, that agreement and will to federate did not automatically translate into a sense of community or fairness: in the United States, this sense developed only after unity was enforced in the aftermath of a civil war; in Canada, Québec remained a reluctant participant; and the United Kingdom has remained in many ways the Québec of the European Union.²²

In a case of holding-together federalism such as Belgium, embedded as it is in the external incentive structures of the European single market, a constructive will to cooperate and compromise may yet prevail (see Chapter 9). In other cases such as Iraq or Yemen, however, where internal conflict is reinforced rather than constrained by external interest machinations, money, and weapons, the promise of holding-together federalism as a “palliative to secessionist conflict”²³ must inevitably ring hollow.

In a classic essay, Franz Neumann once argued persuasively that there is no value inherent in federalism as such. But he conceded that there are goals that can be attained through federalism only.²⁴ Federalism, in the likewise classic formulation of a Bavarian professor of constitutional law during the formative years of the West German federal republic, merely provides “formal aid” (*Formenhilfe*) in the structuring of complex societal relations.²⁵ The goals that the federal form can help to attain are peaceful cooperation and sharing of common resources. Without the will to do so, or the capacity to organize accordingly, the goals of federalism will remain out of reach.

Federalism, Democracy, and Capitalism

In 1939—at a time when three of the four major democratic federations, the United States, Canada, and Australia, struggled with the division of powers as an obstacle to post-Depression social recovery, and both federalism and democracy

20 Helder de Schutter, “Federalism as Fairness,” *Journal of Political Philosophy* 19.2 (2011): 168.

21 Cameron, “Paradox of Federalism,” 311.

22 Niels Lange, Thomas O. Hueglin, and Thomas Jäger, *Isolierte Partner: Eine vergleichende Analyse von Entscheidungsprozessen unter Krisenbedingungen. Europäische Union und kanadischer Bundesstaat* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2005).

23 Erk and Anderson, “Paradox of Federalism,” 191.

24 Franz L. Neumann, “Federalism and Freedom: A Critique,” in A.W. Macmahon (ed.), *Federalism: Mature and Emergent* (Garden City, NY: Doubleday, 1955).

25 Peter Lerche, “Mithbericht,” in *Federalismus als nationales und internationales Ordnungsprinzip* (Berlin: Walter de Gruyter, 1964), 93–94.

already had been lost to fascism in the fourth, Germany—Harold Laski wrote, in yet another classic essay, that the vested interests of “giant capitalism” no longer allowed the “luxury of federalism.” The cost of federalism in indulging “local habit,” he argued, could only be afforded in times of capitalist expansion with enough money and resources to go around, providing “the good life” for all. Under conditions of a “contracting capitalism,” however, the subnational governments of a federation would fall victim to a zero-sum game of inviting or keeping in place taxable investment, ever avoiding the “risk of offending the great industrial empires.” The federal government in turn, constrained by the division of powers, would be unable “to implement the purposes of a democratic society” in the sense of providing “approximate uniformity of condition.”²⁶ This was a variant of the old Diceyan view we noted earlier in the book, that federalism “is unfavourable to the interference or activity of government.”²⁷

Laski’s sweeping manifesto on the incompatibility of federalism and capitalism was quickly forgotten because capitalism began to expand again almost immediately after it was written and, overcoming initial rigidities, federal systems soon adapted to new demands. First came the war economies aiding the Allied effort in defeating Germany and Japan, and then came postwar reconstruction that led to three decades of unprecedented economic growth and prosperity. These decades also gave final rise to the modern welfare state and, with it, to the modern understanding and practice of federalism as a system of fiscal transfers and equalization in the name of social solidarity. The obstacles of divided jurisdiction may have contributed to widespread frustration experienced in the 1930s; however, the 1930s were difficult times in a number of countries, and the sense of frustration was equally high in some unitary states while in the federal ones it is not clear that federalism *per se* was the main problem.²⁸

Nonetheless, since every available statistic on economic inequality puts the United States at the top of the list among Western industrialized countries, the question arises whether this has something to do with federalism. In taking up an old question of comparative social inquiry, “why is there no socialism in the United States?”, Theodore Lowi reviewed some of the historical and cultural explanations particular to American society that had been offered almost a century earlier, but then insisted that “federalism is the most important single

26 Harold J. Laski, “The Obsolescence of Federalism,” *The New Republic* 98.1274 (1939): 367–69.

27 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1915), 169.

28 See Herbert Obinger, Stephan Leibfried, and Francis G. Castles (eds.), *Federalism and the Welfare State: New World and European Experiences* (Cambridge: Cambridge University Press, 2005).

factor.”²⁹ Essentially, he argued that federalism prevented the national government from becoming a focus of demands for social change. A similar argument has much more recently been made for South African federalism: the division of powers between national taxation controlled by the majority and provincial redistributive services controlled by the elite amounts to a mutual “hostage game,” which ultimately ensures that the elite “need not fear majority rule.”³⁰ Federalism, in other words, “means inequality.”³¹

Does it? Next to the United States on most charts of income inequality among Western industrialized countries typically sits the non-federal United Kingdom. Federal Belgium and Austria in turn are located closer to the far more egalitarian unitary countries of Scandinavia.³² Liberal ideology, it seems, is more important than federalism. Yet just as Laski argued, there is no doubt that the power of capital is superior to that of labour or ordinary citizens more generally in playing a hostage game of interjurisdictional mobility. However, most federal systems have adjusted themselves to manage those pressures. Moreover, federalism has shown that it can provide opportunity structures for progressive causes as much as it might hinder reform.³³

The primary tension is between capitalism and democracy, not federalism. We began this book with Pierre-Joseph Proudhon’s dire prediction of “another purgatory of a thousand years” unless humanity opened itself up to an “age of federations.” As we saw in Chapter 4, the Proudhonian vision of federalism aimed at extending federal principles of self-rule and shared rule to the realm of socioeconomic reproduction. It remains a vision yet to be explored.

29 Werner Sombart, *Warum Gibt Es in den Vereinigten Staaten Keinen Sozialismus?* (Tübingen: J.C.B. Mohr, 1906); Theodore J. Lowi, “Why Is There No Socialism in the United States? A Federal Analysis,” *International Political Science Review* 5.4 (1984): 369–80.

30 Robert P. Inman and Daniel L. Rubinfeld, “Understanding the Democratic Transition in South Africa,” *American Law and Economics Review* 15.1 (2013): 1–38.

31 Aaron Wildavsky, “Federalism Means Inequality,” *Society* 22.2 (1985): 42–49.

32 <http://www.conferenceboard.ca/hcp/details/society/income-inequality.aspx>.

33 See, for example: Louise Chappell and Jennifer Curtin, “Does Federalism Matter? Evaluating State Architecture and Family and Domestic Violence Policy in Australia and New Zealand,” *Publius* 43.1 (2013): 24–43.

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